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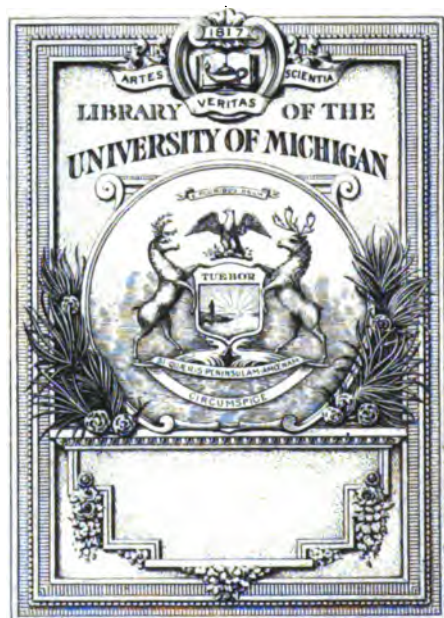
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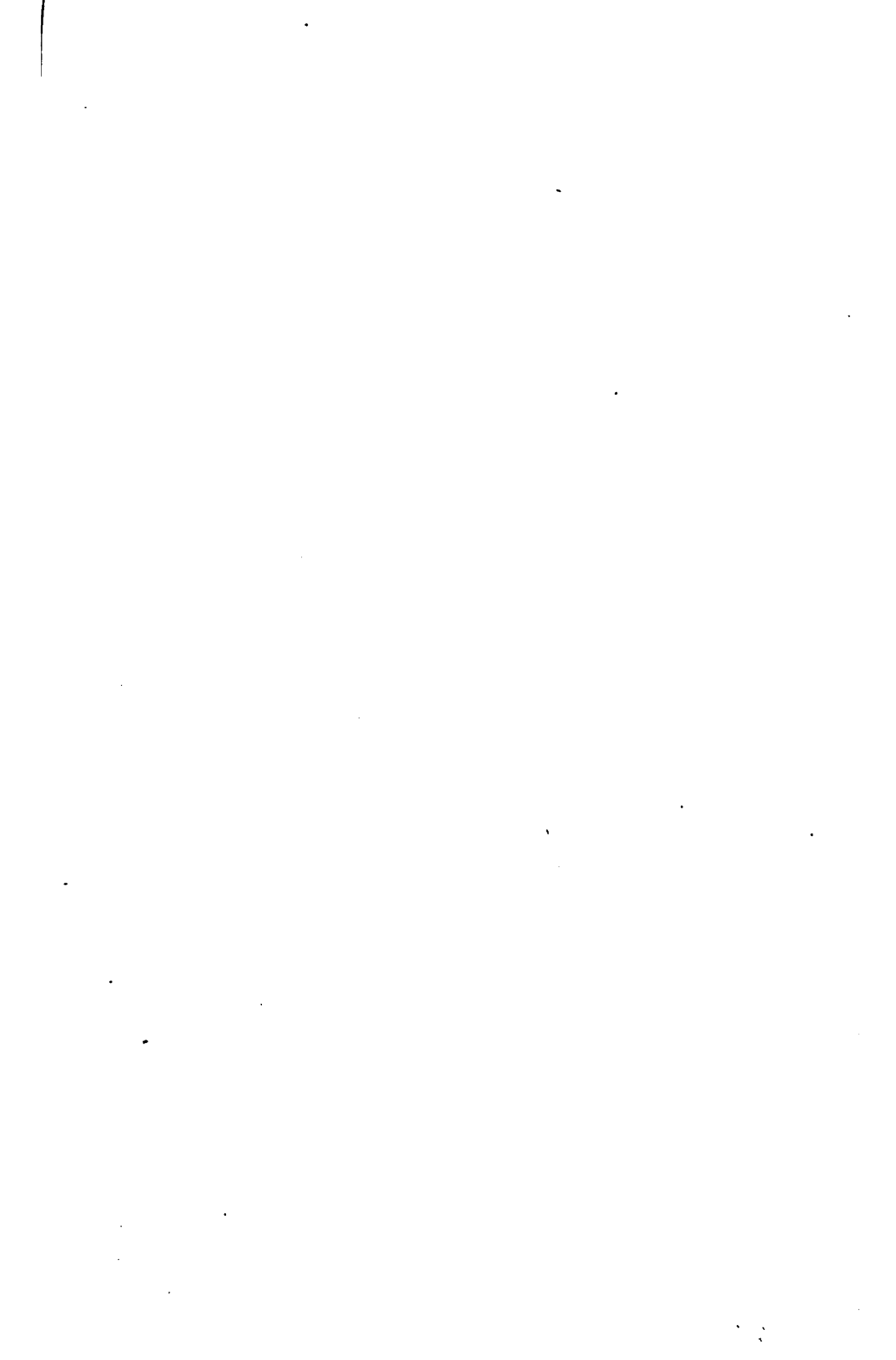


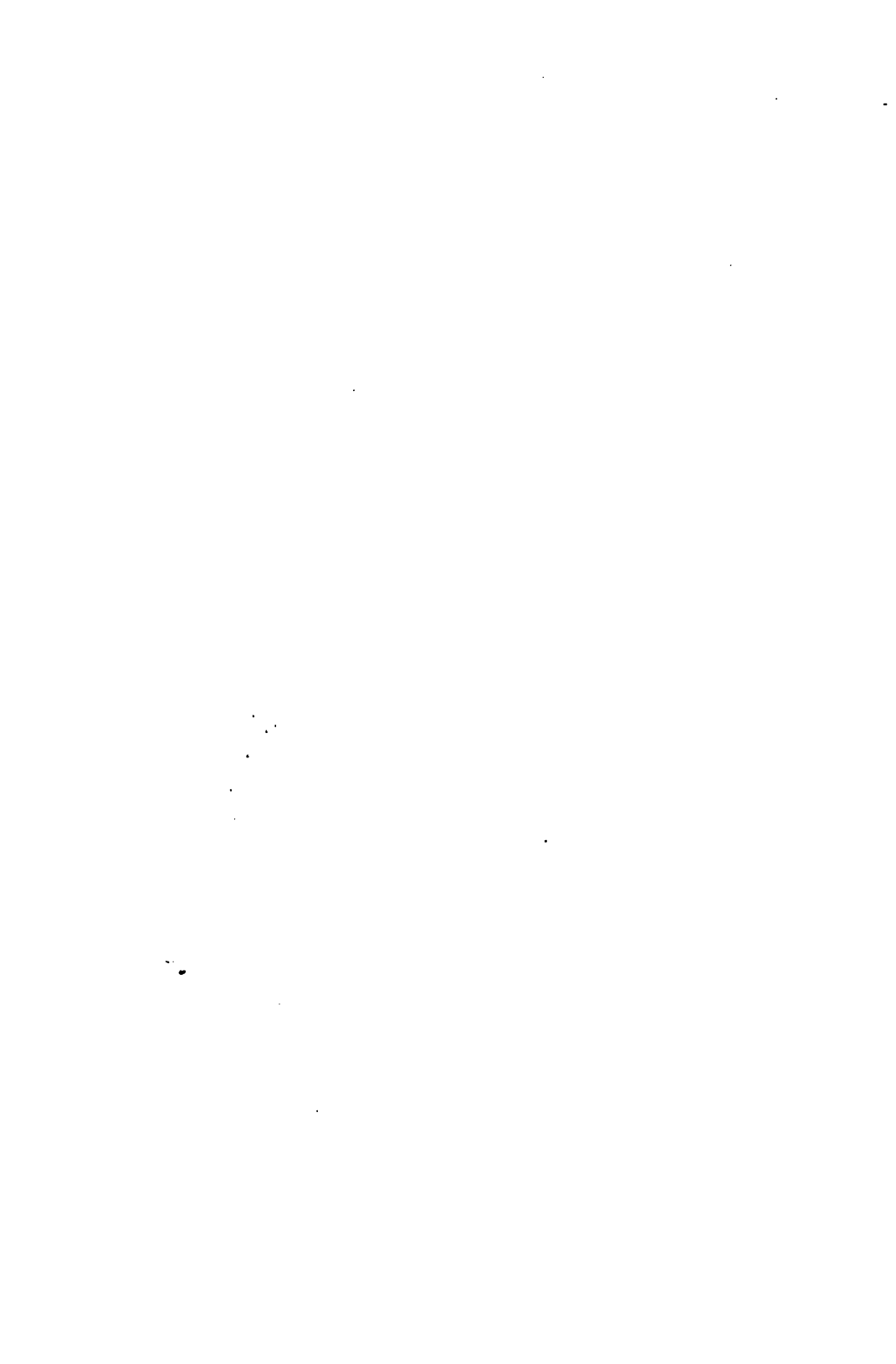
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DOCUMENTS
OF THE
SENATE
OF THE
STATE OF NEW YORK

ONE HUNDRED AND FORTIETH SESSION

1917

VOL. XI.—No. 16—PART 3



ALBANY
J. B. LYON COMPANY, PRINTERS
1917

REPORTS OF DECISIONS

OF THE

PUBLIC SERVICE COMMISSION

SECOND DISTRICT

OF THE STATE OF NEW YORK

FROM JANUARY 1, 1916, TO DECEMBER 31, 1916

Volume V

ALBANY
1917

ALBANY
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1917

By Transfer
1922

COMMISSIONERS

SEYMOUR VAN SANTVOORD, Chairman

DEVOE P. HODSON

WILLIAM TEMPLE EMMET

FRANK IRVINE ¹

JAMES O. CARR

¹Reappointed February 24, 1916.

The Public Service Commission, Second District of the State of New York, was appointed pursuant to the provisions of chapter 429 of the laws of that State for the year 1907, and took office July 1, 1907. It is the practice of the Commission to file written opinions in such contested matters coming before it as seem to demand careful statement of the grounds for the decision. It is also the practice in *ex parte* applications to file written opinions, where the facts are complicated or an interpretation of the laws conferring jurisdiction upon the Commission is required. These opinions are first printed in pamphlet form, and will be published in bound volumes from time to time.

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In the Matter of the Complaint of WEST VIRGINIA PULP AND
PAPER COMPANY *against* BOSTON AND MAINE RAILROAD.
[Case No. 4893.]

1. In an inquiry into the reasonableness of a switching charge it was found impossible to determine with accuracy the exact cost of the service rendered including indirect and overhead expenses. The effort was therefore to reach a determination which would work out justice between the parties as nearly as practicable upon the evidence before the Commission.

2. The switching movement concerned is from the lines of The Delaware and Hudson Company at Mechanicville, through the Mechanicville yard of the Boston and Maine Railroad to the plant of the complainant. The Delaware and Hudson Company delivers the cars upon a track in the yard of the Boston and Maine. The yard is a very large hump yard constructed mainly for the purpose of classifying cars passing through Mechanicville, and many times as extensive as would be required by the complainant's business or by all Mechanicville local business. It was held improper to charge as expense to the complainant's business such proportion of the interest on investment and the maintenance of way and structures of the yard as the number of cars handled for complainant bears to the entire number of cars passing through the yard.

3. In the absence of other evidence than the foregoing, and recognizing that some part of such expenses should be borne by the complainant, one-half of the expense so calculated was allowed as a just charge for the service.

4. For maintenance of equipment respondent claimed an item of twenty-nine cents per day on each car for the average time that cars are kept within complainant's yards. This amount was reached by dividing the entire cost of freight-train repairs and car depreciation of the Boston and Maine system by the number of cars handled on a per diem basis. It being assumed that the cars handled for complainant are mostly foreign cars, and that repairs are not made while they are on the complainant's tracks unless they become necessary, it was held that this charge should not be allowed.

5. A charge was claimed for returning empty cars from complainant's plant to The Delaware and Hudson Company. It appearing that there was an agreement between the Boston and Maine Railroad and The Delaware and Hudson Company for a reciprocal interchange of this service at all connecting points, this item was disallowed.

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6. A tariff of thirty cents per ton for the service involved was held unreasonable, and the respondent ordered to put in effect a tariff of fifteen cents per net ton with a minimum of three dollars per car.

Decided January 18, 1916.

Appearances:

Robert D. Jenks, 700 West End Trust Building, Philadelphia, Penna., for complainant.

W. A. Cole, assistant solicitor Boston and Maine Railroad, North Station, Boston, Mass., for respondent.

G. H. Eaton, general freight agent Boston and Maine Railroad, North Station, Boston, Mass.

IRVINE, Commissioner:

Complainant is a corporation engaged in the manufacture of pulp and paper at Mechanicville, N. Y., and employs about eight hundred men. In the operation of its mill it uses quantities of pulp wood, lime, and other commodities transported from points on The Delaware and Hudson Company lines in the northern part of New York state to Mechanicville, and thence transferred to the mill over switch tracks and the main line of the Boston and Maine railroad. It alleges that respondent's rate of 30 cents per net ton since January 1, 1915, applied to the switching of cars of pulp wood and other commodities arriving from points on The Delaware and Hudson Company lines and transferred to the mill yard is unjust, unreasonable, and discriminatory; that a just and reasonable charge for the switching would not exceed 10 cents per net ton; and asks that an order be issued by the Commission directing respondent to charge in the future for such service only such rates as the Commission may deem just and reasonable.

Complainant declares that the traffic is easy to handle, that the distance over which the cars have to be handled is short, that the volume of traffic is large, and that the cost to respondent is small; also that within the switching limits

of Mechanicville respondent has for many years maintained, under an order of the Commission, a switching charge of \$2 per car between various brick yards on the Boston and Maine railroad in Mechanicville and The Delaware and Hudson Company line where the switch movement is longer than to complainant's yard; and that for many years complainant's traffic arriving over The Delaware and Hudson Company line was delivered at its plant by respondent under joint rates with the connecting carrier upon the basis of 10 cents per ton in excess of the charge of The Delaware and Hudson Company to Mechanicville.

Complainant's plant is located along the Hudson river and east of respondent's main lines, and the tracks within its plant can be reached only by means of switch connections with the Boston and Maine railroad. Pulp wood, lime, and soda ash in large quantities are obtained from points not reached by the Boston and Maine, and are delivered at Mechanicville by The Delaware and Hudson Company. Complainant also receives carload freight from points on the Boston and Maine railroad and upon which no switching charge is assessed by respondent. No switching charge is paid by complainant upon pulp wood traffic arriving over The Delaware and Hudson Company line from Canadian points, joint rates to the mill yard applying thereto. An attempt to cancel these joint rates has been made, but upon complaint to the Canada Railway Commission the proposed cancellation was suspended pending disposition of the complaint.

It appears that all of the tracks within complainant's yard, which with the exception of two or three were formerly owned by respondent, have been or are about to be purchased by complainant, and that respondent will thereby be relieved of the expense of their maintenance.

In the vicinity of complainant's plant, but on the westerly side of the Boston and Maine railroad, are located four brick works or yards with sidetracks connected with

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respondent's line and over which connection with The Delaware and Hudson Company line is effected. The charge of respondent for the transfer of traffic between the last named carrier and the brick yards is on the basis of \$2 per car, as hereinafter described under "History of the Rates". The distances from the interchange point to the brick yards range from 5040 feet to 11,433 feet. The distance from that point to the principal point of delivery in complainant's plant is 3511 feet.

For the year ended March 31, 1915, the number of cars of all materials received by complainant from New York state points was about 1500, composed of approximately 1000 cars of pulp wood, 284 of lime, 89 of lumber, 27 of soda ash, and 114 of salt. The average carload weight of these commodities, based upon the cars received during April and May, 1915, were —

Pulp wood	48,110 pounds
Lime	60,000 pounds
Lumber	35,000 pounds
Soda ash	36,000 pounds
Salt	68,400 pounds

Most of complainant's inbound traffic appears to be pulp wood: one-third comes in over The Delaware and Hudson Company line, and two-thirds arrives via respondent's line, doubtless originating at points outside of the State and upon which no switching charge is assessed. Since the application on January 1, 1915, of the switching rate, much of the pulp wood has been teamed to complainant's yard; apparently the complainant has borne the 30 cent charge on lime and some lumber. Part of the soda ash and salt comes in over the Boston and Maine road and part over The Delaware and Hudson Company line: the portion coming in over respondent's line is subject to no switching charge and the charge on the part arriving on the connecting carrier's line is absorbed by it.

The following table shows a comparison between the cars of traffic received at complainant's yard from The Delaware

and Hudson Company line upon which the 30 cents switching charge was assessed, and cars arriving over the Boston and Maine road subject to no switching charge, for February and March, 1915:

	Over D. & H.	Over B. & M.
February	440	507
March	880	1,112

In addition to these cars, 324 cars arrived under joint through rates via The Delaware and Hudson Company line that were not subject to the switching charge. Many of these cars probably contained pulp wood from Canadian points although the testimony is not clear upon this point. This indicates that the inbound traffic for the period mentioned comprised 2763 cars, and apparently the percentage of the cars upon which the switching charge was borne by complainant is about 29.

The average amount per car based on the switching charge payable to respondent during February was \$9.73 on the inbound freight; on the outbound freight \$7.27, but this is absorbed by The Delaware and Hudson Company, as appears under "History of the Rates". For March the average amount per car on the inbound traffic payable to respondent was \$10.13 per car; outbound, \$6.61. These figures are based upon complainant's computations.

Complainant's office manager, J. W. Gibson, was asked, assuming that the paper was manufactured entirely out of pulp wood and subject to the 30 cents switching charge instead of the joint rates with The Delaware and Hudson Company, what would be the increased cost per ton of paper resulting from the change in the switching charge basis. He replied that it takes two cords of wood, of weight three tons, to make one ton of paper, and that the increased cost would be 60 cents per ton of product, based on three times 20 cents per ton, the increased transportation cost of pulp wood arriving over The Delaware and Hudson Company line. He also stated that a ton of paper delivered at New York city

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sells for \$70, the increase being about 1 per cent of the sale price. Upon this basis it is approximately 0.857 of 1 per cent. He subsequently qualified this statement when he said upon cross-examination that about two-thirds of the inbound shipments of pulp wood arrived over the Boston and Maine road, upon which the switching charge does not apply, and that the increased cost would therefore affect but one-third of the pulp wood shipments. This would reduce the percentage of the increased cost to the sale price to one-third of the percentage first stated, or approximately 0.286 of 1 per cent of \$70: about 20 cents per ton of paper produced. Of course other materials are used in the manufacture of the paper, and upon these apparently switching charges are paid by complainant. This percentage of increased manufactured cost is therefore not exact. The total tonnage produced by complainant during 1914 was 294,000 tons. Upon complainant's statement, the pulp wood used would amount to 588,000 tons. Upon the assumption that one-third of this had arrived over The Delaware and Hudson Company line and that complainant had to bear the increased charge of 20 cents per ton, the additional transportation cost thereon would have been \$39,200.

Complainant paid to the Boston and Maine Railroad during the year ended December 31, 1914, in round numbers, \$288,000 in transportation charge, and about the same amount to The Delaware and Hudson Company.

To avoid the payment of the switching charge it appears that some of the wood traffic has been drayed by a hired cartman from the team tracks of The Delaware and Hudson Company near the point of interchange at the Union station to complainant's plant, seven-tenths of a mile, at an aggregate cost to complainant of 26.8 cents per ton, including the extra labor involved in unloading the wood from the cart to the ground, and that it intends to continue this practice to points within its plant where it has suitable piling ground

to unload the wood. All of this traffic can not be so transferred because the elevators in the mill yard are mainly located to handle the wood from the cars.

THE BOSTON AND MAINE YARD AND THE SWITCHING MOVEMENT

The yard of the Boston and Maine Railroad in Mechanicville is a so called "hump" yard, approximately two miles in length, located westerly of The Delaware and Hudson Company line, connection with which is made at a point below the southerly end of the yard at the Union station by way of respondent's main line. There is also a connection between the yard and The Delaware and Hudson Company line some distance north thereof. The northerly end of the yard is referred to as a "receiving" yard, and the southerly end is used for classifying cars received at Mechanicville and destined for Mechanicville delivery, and also cars destined to points on respondent's lines east of Mechanicville. The classification yard consists of about 35 tracks. The primary purpose in the construction of this large yard was to facilitate the handling of trains bound east of Mechanicville by the classification of the cars therein, making unnecessary subsequent classifications at points farther east and to that extent relieving congestion in other yards of respondent.

Complainant's pulp wood, lime, and other materials coming in over The Delaware and Hudson Company line are delivered by a switching crew of that carrier to respondent at the point of interchange near the Union station at the southerly end of classification yard. Other cars destined to Mechanicville and to other points on respondent's lines are also indiscriminately delivered to respondent at this point. They are then classified by respondent in the classification yard and shifted according to destinations and consignees, those for complainant being switched to track No. 1. Complainant's cars are subsequently taken by an engine of respondent assigned to complainant's work to its plant yard and placed

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according to instructions of complainant's yard foreman. The loaded pulp wood cars are brought into the mill yard and distributed by the switching crew at the Sulphite Mill Chipper or building, five or six cars at each room, and if additional movement is desired the cars are pushed to the point for unloading by complainant's employees by means of crow-bars. The distance from the point where the cars are originally interchanged to this Chipper building is 3511 feet. Cars of other commodities are placed by the switcher at other points in the yard.

The movement from track No. 1 to the mill yard is over a level or slightly descending grade. The outbound movement of the cars, especially the pulp wood cars, after being unloaded by complainant is to respondent's classification yard where they are again classified. Such of them as route back to The Delaware and Hudson Company are set over into that carrier's yard by respondent's switch engine, but not by that assigned to complainant.

At the north end of receiving yard the traffic coming from The Delaware and Hudson Company to the Boston and Maine road is coal, principally interstate traffic.

The switching movement from the Mechanicville brick yards on traffic destined to Delaware and Hudson points is substantially the same as to classification in the southerly end of the yard, the brick cars passing over the same part of the main line of respondent that is used by complainant's cars to and from its plant: that is to say, all of the cars for The Delaware and Hudson Company are placed upon one track and then switched to that carrier's line.

HISTORY OF THE RATES

In 1886 a contract was entered into by the predecessors in interest of the complainant and respondent which provided for the payment to respondent of \$1 per car, loaded or partly loaded, for switching movement of all cars in or out of complainant's plant. This switching charge was applied in addi-

tion to the rate for road haul to or from Mechanicville, and was not absorbed. It was continued in force until early in 1909.

In the latter part of 1908 respondent endeavored to establish at Mechanicville a switching rate of 30 cents per net ton to apply on all carload freight except coal, to which the rate was to apply upon a gross ton basis, for movement to and from The Delaware and Hudson Company line, the Hudson Valley railway, and including yards of various brick manufacturing companies located on its line. The tariff authority for this rate excepted switching service to and from complainant's plant, which it was proposed to continue upon the basis of the \$1 per car charge and to apply to all freight whether handled over the Boston and Maine railroad or switched to or from The Delaware and Hudson Company line. It was also proposed to apply the 30 cents per net ton rate to brick moved from the brick companies' yards to complainant's plant, and to all freight switched from complainant's yard to the plants of the brick companies. The switching rate affecting the brick companies' traffic was intended to supersede a charge of \$2 per car applying between the brick yards and The Delaware and Hudson Company line which had been in force for a number of years. The increased charge was the subject of complaint before the Commission, the result being an order of the Commission issued December 2, 1908, requiring respondent to make effective on or before December 7, 1908, a charge for switching loaded cars in either direction between the brick companies' plants and the customary place of delivery upon or at the tracks of The Delaware and Hudson Company in Mechanicville, which should not exceed the sum of \$2 for each loaded car so switched or hauled. The order also provided that it should remain in force for a period of three years from the date thereof, unless sooner modified, superseded, or abrogated by order of the Commission upon the application of any party or person interested. The order was complied with and

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the \$2 rate continued in force (the proposed increase having been suspended by the carrier) under authority of the Boston and Maine Railroad freight tariff P. S. C., 2 N. Y., No. 244, effective December 7, 1908, as applied to all freight not interstate traffic moved between respondent's connection with The Delaware and Hudson Company line and the yards of the brick companies. This tariff also included authority for the continuance of the \$1 per car switching charge applying to complainant's traffic with the exceptions above noted.

The \$2 per car rate to and from the brick yards has since been continued in effect under superseding tariff authority. On the product of the brick companies [outbound] in the movement of which The Delaware and Hudson Company is involved, joint rates are in force which are \$2 per car in excess of The Delaware and Hudson Company rates, but on inbound traffic the \$2 per car is assessed separately. Respondent stated at the hearing, however, that the entire rate structure on its railroad is undergoing revision and has been for over a year; that the \$2 rate is unremunerative and will be canceled, a 30 cents per ton charge to take its place.

It appears that at the hearing of the brick companies' complaint the \$1 rate applying to complainant's switching was the subject of discussion upon the question of discrimination in favor of the paper company's traffic, and effective February 1, 1909, it was canceled under authority of respondent's tariff P. S. C., 2 N. Y., No. 250. This tariff also specifically authorized the application of a switching rate of 30 cents per net ton on all freight moved between complainant's yard and The Delaware and Hudson Company line, except coal which was put upon a gross ton basis, the rate being subject to a minimum charge of \$4.50 per car. The same charges were made applicable to all freight moved to or from The Delaware and Hudson Company line, or the Hudson Valley railway, and public or private track deliveries of the Boston and Maine Railroad within the switching limits of Mechanicville (excepting the brick yards' traffic). None

of these rates were thereafter canceled, but the minimum charge per car was subsequently reduced to \$3.

Also effective February 1, 1909, under tariff authority issued by The Delaware and Hudson Company, concurred in by the Boston and Maine Railroad, joint rates were established on carload shipments of commodities used by complainant originating at points on The Delaware and Hudson Company lines and including delivery in complainant's plant as follows:

On pulp wood from many points on the Adirondack and Champlain divisions of The Delaware and Hudson Company;

On lumber from Sandy Hill (now Hudson Falls);

On lime from Glens Falls;

On broken stone (which includes limestone) from Chazy.

The establishment of these joint rates from Northern New York territory, which is non-competitive with the Boston and Maine road, made inapplicable the 30 cents switching charge noted in tariff authority effective on the same date above referred to in connection with this inbound traffic arriving at Mechanicville on The Delaware and Hudson Company line. These joint rates generally exceeded the local rate of The Delaware and Hudson Company to Mechanicville by the amount of 10 cents per net ton, which was equivalent to a switching charge of \$2 per car based upon a carload weight of 40,000 pounds (which respondent states was the classification minimum applicable to much of complainant's traffic), and was also the proportion of the joint rates accruing to the Boston and Maine Railroad. A carload weight of 40,000 pounds was not the classification minimum applicable to pulp wood, lumber, and lime: 30,000 pounds applying to pulp wood, 34,000 pounds to lumber, and 36,000 pounds to lime; but it did apply to broken stone. The end aimed at, however, was to put complainant's traffic upon an average basis of \$2 per car for switching service.

It further appears that since December 25, 1910, the switching rate of 30 cents per net ton has been absorbed by The Delaware and Hudson Company on complainant's out-bound traffic destined to all points reached by that carrier's line or its connections.

Previously the absorption was confined to traffic destined to competitive points. It has also been the practice of The Delaware and Hudson Company to absorb the 30 cents charge on all carload traffic, except coal and coke, and except pulp wood coming from Canadian points (upon which joint rates were also established), that originates on other roads and moves over its lines, or that originates on its lines at certain specified stations including points in New York state also reached by the Boston and Maine Railroad or its connections. In other words, it does not absorb the charge on inbound traffic confined to movement over The Delaware and Hudson Company lines.

The net result of these traffic arrangements was that complainant was not called upon to bear more than 10 cents per net ton for the switching service as to the inbound traffic from points of origin on The Delaware and Hudson Company lines covered by the joint rates, and particularly the pulp wood, lumber, lime, and broken stone shipments.

The joint rates with The Delaware and Hudson Company thereafter remained in force until their cancellation on January 1, 1915. The switching charge of 30 cents per net ton then became automatically effective (with exceptions not here material), resulting in an increased charge to complainant above the former existing joint rates of 20 cents per net ton. This increase affects mostly the pulp wood shipments, but to some extent the lumber and lime, obtained from points on The Delaware and Hudson Company lines.

THEORIES AS TO COST OF SERVICE

Respondent's Theory: (Testimony of W. C. Kendall.)
This statement is based upon the cost of handling during the

year 1914 all cars through the Mechanicville yard, and also all of the cars handled to and from complainant's plant.

Operating Cost: The wages of the station force (eliminating some small items which are joint with The Delaware and Hudson Company), \$217,593.29, divided by the total number of cars handled through the yard, 204,354, gives a cost per car of \$1.064. It is said to cover all such cost from the time the cars are dropped by the road trains until they are picked up by the paper mill switcher.

The operating costs directly chargeable to complainant are said to include the cost of the switcher and the actual wages for the year of employees engaged in the work: that is to say, the cost of operating into the plant, and also the wages of the lift-tender in the yard, 80 per cent of the yard clerks' time, the rental of the engine, "and so forth". This amount for the year is stated as \$15,577.68, and divided by the number of cars which were placed upon complainant's tracks, 8632, gives an average cost per car of \$1.804.

Overhead Charges: The cost of the entire yard at Mechanicville is said to be \$1,838,905.91. Respondent states it must provide an annual return or revenue of 6 per cent upon that amount, or \$110,334.35. To this last amount is added \$17,116.67, taxes for 1914: a total of \$127,451.02. This is divided by the total number of cars handled through the yard (204,354), producing a quotient of \$0.623, which is presented as the average overhead charge per car for all of the cars handled through the entire yard.

According to the annual report of respondent for the year ended June 30, 1914, the latest available one showing detail cost figures for extension and betterment projects, this yard improvement and the charges to road and equipment accounts in connection therewith to that date appear as follows:

Freight yard extension.....	\$892,845.02
Enginehouse, machine shops, etc.....	556,133.60
Machinery equipment.....	42,760.82
Westbound yard.....	127,869.00
Total.....	\$1,619,608.52

Maintenance of Way and Structures: This is for the Mechanicville yard, excluding complainant's tracks; and includes "ballast, ties, rails, track repairs, removal of snow and ice, maintenance, and so forth". By some method not clearly ascertainable from the testimony, respondent arrives at a figure of 32.26 cents per foot for this item, based upon figures "taken from the annual report". There are approximately 50 miles of track within Mechanicville, 3 of which are main line. The 47 miles of sidetrack are divided by 3, respondent stating that 3 miles of sidetrack are equal to 1 mile of main line as to cost of maintenance of way and structures, resulting in 15.66. To this is added the 3 miles of main line, resulting in a sum of 18.66 miles. This seems to have been multiplied by 5280 feet, resulting in 98,524.8 feet, which in turn is multiplied by 32.26 cents per foot, producing an amount of \$31,784.10: which divided by the total number of cars passing through the yard (204,354) gives 15.5 cents as stated by respondent to be the cost per car for maintenance of way and structures in the Mechanicville yard. Respondent also states there is no way for ascertaining the actual cost of this item at Mechanicville; that there are no figures kept for individual station repairs.

Maintenance of Equipment: Respondent again states it uses total figures for the year for this item "showing cost of repairs, depreciation, and including other items which appear in the annual report". It arrives at an average cost per car per day of 29 cents, but how is not readily grasped. Upon cross-examination the witness stated the amount for the year was \$3,418,404.35, and covered the total cost of freight car repairs, including depreciation, repairs, and general overhead expenses; excluding inspection, properly chargeable to cars and paid by respondent for all freight equipment on its road, whether owned, foreign, or private. The annual report shows "Freight-train cars repairs, \$2,990,221.30"; and "Freight-train cars depreciation, \$365,232.49". What constitutes the balance of \$62,950.56 does not appear. It is said that the

average number of days that cars are on complainant's tracks is five, but using four days as a basis witness arrives at an average of \$1.16 per car as the amount chargeable to complainant's switching for maintenance of equipment. Respondent apparently has used the aggregate number of cars handled over the entire line, not stated in the record or annual report, divided into the total amount stated for maintenance of equipment in arriving at the 29 cents figure. The witness admitted on cross-examination that depreciation is not chargeable on Delaware and Hudson cars received, and also that the cars are supposed to be in suitable condition for handling when received. He further stated that the actual expense for the maintenance of equipment received from The Delaware and Hudson Company for delivery to complainant's plant was not obtainable.

General Transportation Expenses: Respondent states this includes pay of officers and clerks, weighing, heating, and lighting, miscellaneous station supplies, and other miscellaneous accounts. "And again dividing by the number of cars handled, obtaining this figure by proportions of the total, we find the cost per car chargeable to Mechanicville is 22.6 cents." It is impossible to check this item with the meager information furnished. Here again the aggregate number of cars handled on the line is involved.

As a final figure, respondent presents 88.3 cents as representing 83 per cent of the "Mechanicville cost per car": that is to say, 83 per cent of \$1.064, the "Operating cost" of the Mechanicville yard, because it finds by actual tests that of all the cars which come to it via The Delaware and Hudson Company line, 83 per cent of such cars are returned to that carrier through the Boston and Maine yard. Only the bare statement is presented; but upon cross-examination it appeared that this re-handling is in accordance with a reciprocal agreement, existing at all interchange points, under which The Delaware and Hudson Company puts the

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loaded cars destined for complainant's plant into the Boston and Maine yard; and respondent returns all cars, including loaded ones destined for Delaware and Hudson points, to that carrier's yard.

Summary: Summarizing the foregoing figures produces the following:

Operating cost	\$1.064
88 per cent thereof.....	.883
Operating costs directly chargeable to complainant.....	1.804
Overhead charges .....	.623
Maintenance of way and structures.....	.155
Maintenance of equipment.....	1.16
General transportation expenses.....	.226
Total.....	\$5.915

The total of these amounts, \$5.915, indicates the cost per car of switching complainant's traffic to and from The Delaware and Hudson Company yard at Mechanicville as submitted in detail by respondent. Respondent's summary states it as \$5.867. It uses the same sub-items, except \$1.112 is given as representing the cost of maintenance of equipment, but why this last amount is used in face of the explanation previously made does not appear. Perhaps it is an error.

Upon cross-examination it appeared that respondent's yard facilities at Mechanicville include an enginehouse with accommodations for about thirty locomotives. In figuring the proportion of the enginehouse expenses the costs were divided between the road engines and yard engines, and the yard engine cost used in the statement. In computing the interest on the total yard plant the witness admitted he had used the total cost of the enginehouse although it is also used for road engines between trips. In respondent's brief this error is admitted, and statement is made "Omitting entirely all interest charges on these engine facilities would reduce the total cost per car by only 17 cents, so that whatever the proper allocation between yard and road operations the matter is of small importance".

Respondent's witness admitted that it was impossible to segregate the cost of handling any particular type of cars through this yard and that he simply included all the items of cost of operating the entire yard, including items involved in the classification of eastbound cars, those involved in placing of the cars, and those involved in maintaining the receiving yard, in one general sum, and then divided that general sum by the total number of cars handled in any part of the yard.

This witness referred to a decision of the Interstate Commerce Commission relating to switching charges at Milwaukee (XXXII I. C. C. Rep. 509, decided January 5, 1915), and read from it to the effect that the average cost, including the operating expenses, taxes, and return on investment, of handling a car between connections with the Chicago and North Western railway and certain industrial yards on the line of the Chicago, Milwaukee and St. Paul railway [respondent] was \$8.13; between connections with the Grand Trunk and the yards, the same amount; and between connections with the Pere Marquette and the same yards, \$9.42; also that the Wisconsin Commission (which had investigated the same question and rendered its decision about nine months before the Federal Commission, 14 Wis. R. R. Com. Rep. 261) had found that a charge of \$6.11 per car for "in" movement and \$5.96 per car for "out" movement would no more than cover operating expenses, taxes, and fair return on investment. He admitted, however, that he did not consider the unusually congested Milwaukee switching district, involving two hundred and eighty-seven miles of track, and switch movements varying from a few hundred feet to fifteen miles, comparable with the operations herein involved, but presented the figures to show by comparison that the cost of switching is high and "higher than any one has thought existed".

Complainant's Theory: (Testimony of C. C. Fergason.) This witness produced a paper, referred to as exhibit No. 4,

submitted by the Boston and Maine Railroad in the proceeding before the Canada Railway Commission upon the complaint as to discontinuance of the joint rates on pulp wood coming from points on the Grand Trunk railway to Mechanicville. It purports to show the number of cars and tons of freight originating at points on the Grand Trunk railway and also The Delaware and Hudson Company lines received at Mechanicville from the last named carrier during the calendar year 1913, and switched by respondent to complainant's plant. The aggregate number of cars is 657; the total number of tons, 17,862; aggregate revenue received by respondent based upon 10 cents per ton, \$1786.20. It shows the switching operation cost respondent \$2207.52, or an average cost per car of \$3.36, divided into wages, \$1.10; power, \$0.46; per diem four days, \$1.80. This cost does not include maintenance and overhead charges. Respondent's witness Kendall stated this cost covered operation only within the Boston and Maine Railroad yard, and not into complainant's plant. The per diem charge, 45 cents per day, is what a carrier usually pays while a car of another carrier is on its lines, and for which it is partly compensated by demurrage charges when they accrue. The wages are said to cover those of the switching crew; and the power, the average cost of locomotive operation: that is fuel, water, oil, waste, and repairs. Complainant states that under a provision in the Per Diem Rules—"An arbitrary amount for each car in switching service may be reclaimed by each individual switching line from the roads for which the service is performed"—the per diem portion of this estimate should be excluded, which would reduce the average cost per car to \$1.56. There is such a provision in the Code of Per Diem Rules, and it is understood they apply to traffic interchanged by respondent and The Delaware and Hudson Company.

Complainant also submitted some figures of its own upon this question. Based upon all the cars it received and for-

warded during February and March, 1915, it estimated the average time the switching crew worked. For March, it found the average per day was 11 hours and 4 minutes. It allowed 14 hours per day for each member of the crew; the engineman at 41 cents, fireman at 25 cents, conductor at 38 cents, and three brakemen at 35 cents, or a total of \$2.09 per hour for the entire crew. It then estimated \$25 per day for the use of the switch engine, "fuel, oil, and things of that sort," and finally arrived at an amount of \$1.01 per car for the cost of the switching service. No details are furnished as to the number of cars used. This amount covers only the movement between respondent's yard and the mill, and does not include overhead charges and maintenance.

Summary of Evidence: Respondent's stated cost as presented to this Commission, including maintenance and overhead charges, \$5.867 per car.

Costs as shown in exhibit before the Canada Railway Commission (including per diem charges), maintenance and overhead not considered, \$3.36 per car.

Cost as shown in exhibit before the Canada Railway Commission (excluding per diem charges), maintenance and overhead not considered, \$1.56 per car.

Complainant's estimated cost, maintenance and overhead not considered, \$1.01 per car.

CONCLUSIONS

The evidence offered by the complainant so far as it relates to the cost of the service is too general and incomplete to afford a basis for adjusting the rate. The estimate of \$1.01 per car covers only wages and an estimated sum of \$25 per day for the use of engine, fuel, oil, etc. No figures submitted by the complainant include any overhead or general expenses, and it is evident that in order to reach any proper result some allowance must be made in that direction. The order of the Commission made December 2, 1908, fixing the switching rate on brick at \$2 a car is not controlling. It

expired by its own limitation four years ago. We can take notice that since 1908 changes have occurred in operating expenses which would seriously affect the calculations then made by the Commission. The trend of the evidence is to indicate that the old joint rates designed to accomplish a standard rate of \$2 per car are now too low. It is easier to reach this conclusion than it is to determine what would now be a just and reasonable rate. Experts in such matters produce figures of great precision, but precision and accuracy are not convertible terms. The "World Almanac" publishes "Statistics of the Countries of the World". These statistics include population. The population of the United States and insular possessions is there stated as 109,282,464, which may or may not have been an accurate statement at some particular moment. The population of China is stated at 325,000,000, evidently merely an estimate if not a mere guess. If all the figures in these columns were added we should reach a very precise total as to the population of the earth, but no one for a moment would assert for it the merit of accuracy. The analysis of the respondent's testimony heretofore given well illustrates this principle, and for that reason could not be accepted as an exact statement of the actual cost of the switching service even if all the items claimed by the respondent were to be allowed. The following from the opinion of the Wisconsin Commission in the Milwaukee case heretofore referred to, 14 Wisconsin Railroad Commission Reports 261, is pertinent:

It is evident at once if each movement be called upon to pay a rate exactly equal to the estimated average cost of performing the service, and including in such cost all indirect or overhead costs and dividends, many of the movements could never be made on account of the prohibitive rate. The carrier should be satisfied with a rate which, while not covering all the items upon which it is entitled to a return, will nevertheless pay all the direct costs and assume a share of the burden of indirect costs. This reasoning is in line with principles often applied in tariff making in general.

It should be noted in this connection that these movements require the use of properties the value of which, when compared with other

railway property used and useful in the service of the public, is exceedingly high. On the other hand, it can not be said that the nature of these movements is such as to place them very high with respect to their value to the shipper. The bulk of the movements consists in the transportation of raw materials or partly manufactured materials to places of ultimate production. These two considerations, in their nature more or less antagonistic, make it extremely difficult in cases like this, to apply the cost theory of rate making unalloyed.

In spite of the difficulty and the necessary uncertainties involved, it becomes necessary for us to endeavor on the evidence before us to reach a determination which will work out justice between the parties as nearly as practicable but without any pretense that it is based on an exact finding of the actual cost of the service rendered.

The respondent's item of \$0.623 "overhead" can not be allowed to its full extent. It is based on an interest charge of 6 per cent on the cost of the entire Mechanicville yard, plus taxes. The cost of the yard is somewhat greater than shown in the respondent's report, but perhaps this difference is due to the fact that the yard is not yet completed and that the respondent's figures embrace an estimate of the final cost. It is attempted to allocate to the complainant's service such proportion of this overhead expense as the number of cars handled for complainant bears to the entire number of cars passing through the yard. This very extensive hump yard was not constructed to handle complainant's business or to handle Mechanicville business. It was mainly for the classification of cars passing through Mechanicville and destined to other points on or beyond respondent's lines. Presumably it was constructed for reasons of economy in the handling of this through business. A yard representing only a small fraction of this cost would handle the complainant's traffic and all other Mechanicville traffic. The evidence shows that in fact only a small part of the yard is used in the service herein involved. It is not fair to charge upon the complainant, because of the accident that its cars are handled through one part of this extensive yard, this pro-

portionate share of the entire yard overhead. At the same time the business of the complainant is so large that in the absence of a classification yard some special provision would have to be made. We are entirely at a loss to ascertain from the evidence what a proper overhead charge for such terminal facilities would be. On the whole, it would seem not unfair to adopt the principles of Solomon and allow to the respondent one-half of what it claims.

The same considerations apply to the item of maintenance of way and structures.

We feel that there is no basis for any allowance for maintenance of equipment. This is a charge of twenty-nine cents (\$0.29) per day on each car for the time that cars are on the average kept within complainant's yards. It is reached by an allocation to these cars of a proportion of the cost of freight-train repairs over the entire system of the respondent. To this must be added over \$365,000 for depreciation of cars in order to make the evidence correspond in any degree with the reports of the company. All the cars come from The Delaware and Hudson Company. It is fair to assume that they are mostly foreign cars: that is, foreign to the Boston and Maine. It is also fair to assume that repairs are not in fact made unless they become absolutely necessary. To charge for repairs the full quota of the entire cost of car repairs, including depreciation on the Boston and Maine lines, would be clearly unreasonable. There must necessarily be some expense of this character and it would seem that respondent might have shown what the actual expense has been, but there is no evidence on the subject.

The charge of 83 per cent of the "Operating cost," amounting to \$0.883, must also be disallowed. This simmers down to a charge for returning cars from the complainant's plant to The Delaware and Hudson Company. The evidence shows that there is an agreement between the two companies by which this service is exchanged between them at all connecting points, and it is fair to assume that this reciprocal

service approximately balances. In performing it in the case of complainant's cars the respondent is merely repaying The Delaware and Hudson Company for services it is receiving elsewhere and with which the complainant has nothing to do.

With these exceptions let us accept the respondent's estimates as to other items of cost. It is not a rash presumption that they do not unduly favor the shipper. By so doing we reach this estimate of the cost of service:

Operating cost:	
Wages of station force, etc. (proportion allocated to complainant)	\$1.064
Directly chargeable to complainant's service.....	1.804
Overhead charges	\$0.623
Maintenance of way and structures.....	0.155
	<hr/>
	\$0.778
One-half of this	0.389
General transportation expenses.....	0.226
	<hr/>
Total	\$3.483

If we now assume a switching rate of 15 cents per net ton, with a minimum charge of \$3 per car, and make a calculation based upon the average weight per car of commodities received by complainant during April and May, 1915 (the evidence available from the record), and the number of cars received by complainant from New York state points during the year ended March 31, 1915, we reach the following result:

Pulpwood (24.05 tons), 1,000 cars, 24,050 tons	\$3,607.50
Lime ....(30.00 tons), 284 cars, 8,520 tons	1,278.00
Lumber ..(17.50 tons), 89 cars, minimum charge	267.00
Soda ash (18.00 tons), 27 cars, minimum charge	81.00
Salt .....(34.20 tons), 114 cars, 3,898.8 tons	584.82
	<hr/>
Total	1,514 cars, \$5,818.32
Total cost of switching 1514 cars at revised estimate of \$3.48	
per car	5,268.72

This would allow to the respondent an excess of revenue over estimated cost of \$549.60, or a little more than 10 per cent. The Commission is convinced that this is a reasonable

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rate at least from the standpoint of the railroad, and that no matter what may be the cost of such service in other States and on other points of respondent's system, and notwithstanding its desire to establish a uniform switching rate throughout its system, its present tariff rate of 30 cents per ton is unjust and unreasonable when applied to the service herein considered. That tariff should be canceled, and a tariff of 15 cents per net ton, with a minimum of \$3 per car, should be filed in its stead.

In the Matter of the Complaint of MARVIN SHIEBLER *against* SUFFOLK GAS AND ELECTRIC LIGHT COMPANY, requesting revocation of the Commission's order authorizing \$134,000 mortgage bonds. [Case No. 3427.]

1. The purchaser of corporate bonds must be presumed to have acquired his securities with full knowledge of the terms of the mortgage under which issuance of additional bonds may from time to time be made; and when the conditions of the mortgage which govern such additional issue of bonds have been complied with, and after due examination such proposed issue of bonds has been approved by this Commission, it must be deemed that the bonds have been properly issued, and the order must stand unless shown to have been granted in misapprehension of essential facts or there is established in the transaction a deliberate exercise of bad faith by the applicant corporation.

2. It is not to be accepted as an invariably controlling principle that unless it can be unquestionably demonstrated that a proposed extension of service by an established public service corporation will prove immediately remunerative the enterprise should not be undertaken. When such an extension has been determined upon in manifest good faith by the corporation and the project has been approved by the examining experts of the Public Service Commission, the latter may properly authorize the issuance of bonds to cover the cost of the extension. Distinction drawn between *Rochester Corning Elmira Traction Company matter*, 1 P. S. C. Reports, pp. 166 and 187, in which was involved the probable earning capacity of a new enterprise in its entirety, and the present case, where the question was as to the probable immediate earning power of a single extension of an enterprise already under way.

3. Determination of the far-reaching questions involved in the problems of extensions is properly intrusted to the discretion of the directors of the enterprise; and unless manifestly exercised in bad faith, or at least in plain disregard of the rights of others interested, the discretion of the directors should not be overruled by the Commission, which in the exercise of its regulative functions is not called upon in such questions of corporate administration to substitute its own point of view for that of those directly responsible to the owners of the property and to the public.

Decided January 20, 1916.

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Appearances:

Ralph K. Jacobs and Lewis J. Smith for complainant, and complainant in person.

Wm. H. Robbins and Henry R. Frost for respondent.

VAN SANTVOORD, Chairman:

This is an application for revocation of an order of this Commission authorizing the issue of bonds by the Suffolk Gas and Electric Light Company for the purposes of prospective construction.

By its order of April 10, 1912, this Commission authorized the Suffolk Gas and Electric Light Company to execute a mortgage upon its property to secure not to exceed \$500,000 in amount of its 5 per cent bonds, and to forthwith issue \$200,000 in amount of such bonds for refunding purposes, and other \$150,000 in amount of such bonds to provide funds for the discharge of certain existing liabilities and to pay for current construction. The mortgage provided that the remaining \$150,000 in amount of bonds should be issued "at such times and in such amounts as required by the corporation," such "requirement" to be duly evidenced by resolution of the directors, and any such issue to be authorized by this Commission. Upon further application by respondent, under date of October 25, 1912, this Commission by its order entered January 29, 1913, authorized the issue of \$134,000 in amount of such remaining bonds, the same to be sold at not less than 87 per cent of par, and the proceeds to be used for certain new construction in said order specified. According to the last official report of the respondent, \$55,000 in amount of said last mentioned bonds had been issued by the corporation down to September 30, 1915.

In its determination and order of February, 1913, approving and authorizing the issuance of these additional bonds, the Commission was unanimous. No objection to the determination of the Commission has ever been raised by the trustee of the mortgage (such trustee apparently being itself

the owner of a considerable amount of the previously issued bonds), or by any holder of bonds of the corporation other than the complainant, except that after the final presentation of the case in December last, the owner of one \$1000 bond informally advised the Commission that he was in accord with the complainant herein. Upon the final argument, complainant urged that neither he nor any other individual bondholders had received notice of the application upon which the order complained of was based. No such notice is required by the Rules of Practice of the Commission, and a requirement therefor would manifestly be both unnecessary and impracticable. The purchaser of corporate bonds must be presumed to have acquired his securities with full knowledge of the terms of the mortgage under which issuance of additional bonds may from time to time be made, such issuance in this case being plainly conditioned alone upon the requirements of the corporation as determined by its directors and approved by this Commission. The requirements of the corporation having been thus determined and duly certified to the trustee of the mortgage as therein provided, and this Commission, after examination and upon the recommendation of its engineers and accountants, having duly approved such action, it must be deemed that the bonds have been properly issued, and the order must stand unless shown to have been granted in misapprehension of essential facts or there is established in the transaction a deliberate exercise of bad faith by the applicant corporation. A careful examination of the record discloses no such wrong doing on the part of the respondent or of its directors, and no such misapprehension of facts by this Commission in the granting of the order as would compel or justify its revocation.

The principal allegations of the complainant are that he was the owner by purchase of \$6000 in amount of the \$150,000 of bonds the issue of which was authorized in the Commission's order of 1912 aforesaid; that the proposed extensions of respondent's mains from Babylon to Bay Shore

and to Sayville, to meet the cost of which the issuance of \$134,000 of additional bonds has been authorized, were unwisely and improvidently projected and would not prove remunerative, and accordingly that the incidental burdens upon the corporation would impair the equity of the bonds previously issued; that the investment behind the first issue of bonds was not being properly maintained, the corporation designing to use part of the proceeds of the bonds last authorized in purchasing property to replace certain of that which entered into the original security but which had been retired; that the estimated costs of the extension were largely in excess of the fair value of the proposed construction; that the respondent was selling gas to another corporation at less than cost; and that if the estimated expenditure should be permitted it would result in unjustifiable profits to the contractors.

Respondent interposed a general denial of all alleged improper and improvident acts, asserted that the proposed extensions were both wisely and necessarily determined upon, and that accordingly this Commission had acted properly in approving the issuance of bonds. Following a hearing, the Commission caused examinations to be made by its engineers and accountants of the accounts, property, and affairs generally of the respondent corporation. These examinations disclosed, and the Commission has accordingly determined, that the respondent had retired certain property without adequately recognizing such fact in its accounts. The adjustments required properly to correct the accounts of the corporation incidental to such determination are embodied in concrete form in the final report of the Commission's division of capitalization made under date of December 10, 1914; and the recommendations in that report, with the exception of the proposed credit to fixed capital of \$1312.94, which represents 10 per cent of the cost of the respondent corporation's materials used by the contractors, should be forthwith adopted by the respondent and incorporated in its accounts.

The report of the Commission's experts and accountants and the conclusions therein expressed as to the precise adjustments in the accounts of the respondent which are required properly and adequately to cover this matter of replacements are understood to be satisfactory to the complainant except as to the accounting of the so called "Contractors' profit" on the construction work done for the company. This "Contractors' profit" was specifically called to the Commission's attention after the hearings in the case. The respondent's practice has apparently been to procure practically all of its construction work done by the E. L. Phillips Company at labor and materials cost plus 10 per cent, although in a few cases the work has been done for lump sums and some of the gas mains were laid at so much per foot. The percentage mentioned has been characterized as "Contractors' profit"; but the term is a misnomer, inasmuch as a considerable portion of the equivalent amount of the 10 per cent charge, which of course varies with the character of the construction, merely reimburses the contractor for actual expenses, such for example as those salaries and expenses of the members of its organization not specifically billed against the work, use of plant and organization, office costs, carrying cost of the money invested in the work, and many other actually out-of-pocket expenditures which under the prevailing force contracts would not be specifically billed to the company.

Although not alleged in the complaint, it has nevertheless been urged during the progress of the inquiry that the E. L. Phillips Company either controls or is controlled by the respondent corporation. We find no proof of any such relationship. So far as the Commission has been able to ascertain from an examination of the books of the construction company and from the reports and records of the respondent and of certain kindred corporations, the respondent does not own any stock of the E. L. Phillips Company, nor does the latter own any stock of the respondent corporation. Apparently

all that can be urged in support of such alleged "control" is comprised in the fact that E. L. Phillips, who is the president of the E. L. Phillips Company, and certain of his associates in various lighting companies operating in Long Island, together own rather more than four-fifths of the stock of the respondent corporation, Phillips' individual holdings of such stock being less than one-half thereof. Nevertheless, in verifying the charges to the fixed capital accounts of the respondent in connection with the complaint, the Commission's experts examined carefully the books of the E. L. Phillips Company, which were freely put at their disposition, so far as they related to the construction work which that corporation did for the respondent. In the course of such examination it became manifest that even if there existed any undisclosed affiliations between the two companies, the construction company has not taken advantage of any incidental opportunity to reap an undue profit upon its contract work. The lump sum contracts made between these two companies do not disclose unreasonable profits to the construction company; while, as expressly reported by the Commission's engineer [report of October 8, 1914], "the item of 10 per cent in addition to direct labor and materials seems to be entirely reasonable and will probably allow the contracting company very little if any profit".

Moreover, in considering this arrangement with the E. L. Phillips Company it is properly to be noticed that an examination by the Commission of the property and accounts of the respondent covering the period ended November 30, 1911, disclosed the fact that down to that date the respondent's operations had resulted in a substantial deficit; and that as it subsequently appeared, since the date mentioned and down to the year 1914 the corporation continued to operate at an annual deficit. In view of these facts it may fairly be doubted whether without the assistance of the construction company the respondent corporation would have been able to readily dispose of its bonds upon as

favorable a basis as 87 per cent of par, and to provide such extensions, additions, and betterments as were considered essential to its proper development.

For the reasons stated, although this Commission has repeatedly and consistently discouraged the creation of construction companies to undertake the work of extensions and additions of public service corporations which either directly or indirectly own or control such construction companies respectively, and has invariably refused to sanction capitalization by operating companies of so called "profits" to such a construction company where the transaction appeared in the slightest degree questionable, we find nothing improper or objectionable in the relations thus far disclosed between the corporations under consideration in this case, or in the so called "Contractors' profit" of 10 per cent on direct labor and materials paid to the E. L. Phillips Company to cover its other legitimate and necessary outlay above mentioned.

In further support of his contention that rights of the owners of bonds previously issued were being jeopardized by the respondent corporation through its improvident and improper policy of speculative extension and construction, the complainant referred particularly to the extensions of the mains of the corporation from Bay Shore to Babylon, and from Bay Shore to Sayville. Before the company was authorized to issue bonds to provide for the cost of such extensions the matter was inquired into by the Commission's engineer, whose report upon the project was entirely favorable, his recommendation being that the company should be allowed to make the proposed extensions and pay for the same with the proceeds of bonds. If the improvement in the income of the corporation during the past three years is at all indicative, the recommendation of the engineer, upon which the order of the Commission was largely based, appears to have been justified, and the determination of the respondent to make the extensions seems to have been wise and timely. The respondent's operations during the calendar year 1912

resulted in a loss of \$2500, and for the year 1913 the loss was \$1163; but in 1914 there resulted a profit of \$4025. Moreover, it is not to be accepted as an invariably controlling principle, that unless it can be absolutely and unquestionably demonstrated that proposed extensions of mains will prove immediately remunerative the enterprise should not be undertaken. Under such a doctrine much of the most beneficial as well as ultimately profitable development of all kinds of transportation would never have been projected, much less carried out: because in so many instances it is only at the heels of a developed availability that use is stimulated to an extent which will make the enterprise profitable. This conclusion does not in the slightest degree conflict with the decision of this Commission in *Rochester Corning Elmira Traction Company matter*, 1 P. S. C. Reports, pp. 160 and 187, cited by the complainant, in which was involved the probable earning capacity of a brand new enterprise in its entirety, rather than as in the present case the immediate earning power of a single extension of an enterprise already under way. Determination of the far reaching questions involved in the problems of extensions is properly intrusted to the discretion of the directors of the enterprise; and unless manifestly exercised in bad faith, or at least in plain disregard of the rights either of the public or the owners of the enterprise, the discretion of the directors should not be overruled by this Commission, which in the exercise of its regulative functions is not called upon in questions of corporate administration like that under consideration to substitute its own point of view for that of those directly responsible to the owners of the property and to the public.

In view of the favorable change in the results of its operations, the contention that respondent's contract with the South Shore Gas Company of Babylon for the sale of gas to the latter at 60 cents per M cu. ft. was a discrimination against the selling company, seems not borne out by the facts. In computing the cost of this gas at prices ranging

from \$1.01 to \$2.36 per M cu. ft., complainant has included many irrelevant element costs which need not be discussed here.

In the recently filed brief the complainant expresses embarrassment because in the final presentation of this case a former member of this Commission appeared as counsel for the respondent. When this fact was brought to his attention the gentleman in question immediately withdrew from the case, and with the consent of this Commission recalled a memorandum brief which he had filed, which brief, as it happened, had not then been considered or read by the Commission or any member thereof. It may properly be observed that the suggestion in complainant's brief was the first intimation of an objection to the appearance in question. In the light of the event there can not be the slightest doubt that if objection had been made at the hearing the appearance would not have been entered.

The application should be denied and an order entered to that effect.

All concur.

In the Matter of the Complaint of RALPH A. HARTER of Moravia *against* LEHIGH VALLEY RAILROAD COMPANY, asking for additional passenger car service between Cortland and Auburn. [Case No. 5002.]

1. While adequate public service may require the operation of certain unprofitable trains, the Commission will not order additional train service where the existing service seems to be in quantity adequate and the additional service is sought by a limited number of patrons as a matter of convenience rather than necessity and would almost certainly be unprofitable in itself and would decrease the revenues of trains already operated, the entire passenger business of the divisions concerned being conducted at a loss.

2. The Commission will not require a radical change in the schedules of existing trains which have been in effect a number of years and which on the whole meet the convenience of the traveling public, in order better to meet the convenience of a small portion of that public.

3. In the light of evidence as to the cost of operating steam passenger trains locally, the inadequate returns therefrom in territory not densely populated and the known facts concerning recent decreases in the operating revenues of such trains, it was suggested that the carriers endeavor by cheaper methods to provide more convenient service.

Decided January 25, 1916.

Appearances:

Ralph A. Harter, Moravia, in person; *Clayton R. Lusk*, Cortland, N. Y., and *Wing T. Parker*, Moravia, N. Y., as attorneys for complainant.

R. W. Barrett, 143 Liberty street, New York city, Assistant General Solicitor, for respondent.

IRVINE, Commissioner:

While this complaint is made in the name of Mr. Harter alone, it is as he states really on behalf of a large number of people residing in Cortland, Moravia, Auburn, and neighboring points, who ask additional service between Cortland, Auburn, and intermediate stations. The basis of the com-

plaint is a desire for a train between Cortland and Auburn reaching Auburn between 8 and 9 a. m., and a return train leaving Auburn in the early evening. It is suggested that a gasoline car might be installed whereby the service could be rendered at less cost than by a steam train. The respondent challenges the power of the Commission to compel the use of such a car. Without determining this question, although the writer has little doubt of the authority of the Commission to direct a change in motive power when necessary to provide adequate facilities, it is sufficient to say that experience with such cars under the topographical and climatic conditions of the State of New York is too limited to warrant the Commission at this time in compelling their use. The inquiry is therefore narrowed to the purpose of determining whether the road should install early morning and early evening train service as desired by the complainants in order that its service shall be adequate, just, and reasonable. The Lehigh Valley Railroad Company operates its Auburn division from Sayre, Penna., where it connects with the main line, through Owego to North Fairhaven on Lake Ontario, passing through Auburn; and also operates its Elmira and Cortland division from Elmira to Camden, connecting with its main line at Van Etten and passing through Cortland. These two divisions cross at Freeville. The city of Cortland is geographically easterly from Freeville, and Auburn is reached from Cortland by the Freeville connection. Groton, Locke, and Moravia are stations between Freeville and Auburn. The other points affected would be McLean, between Cortland and Freeville, and certain other very small places between Freeville and Auburn.

On the Auburn division there are now operated from Sayre to Auburn on week days two trains daily: one leaves Sayre at 7:20 a. m., Freeville 9:40, and arrives at Auburn at 10:58; the other leaves Sayre at 4:15, Freeville 6:20, and arrives at Auburn at 7:30 p. m. From Auburn to

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Sayre there are three trains daily on week days: the latest leaves Auburn at 4:50 p. m., Freeville 6:35, and arrives at Sayre at 8:35. On the Elmira and Cortland branch, there are between Elmira and Canastota on week days two trains each way daily. These are so arranged as to connect at Freeville with trains each way on the Auburn division. In addition to this service, a train leaves Cortland at 11:30 a. m., passes Freeville at 11:52, and arrives at East Ithaca at 12:10. A counter train leaves East Ithaca at 12:30, arrives at Freeville at 12:50, and at Cortland at 1:10 p. m. This last train carries a car from East Ithaca to Auburn, arriving at Auburn at 2:05 p. m., connecting there with a train on the Auburn road of the New York Central which in turn connects with the Empire State Express on the main line.

There are no large cities on either division. Auburn with approximately 37,000 inhabitants; Ithaca, reached from East Ithaca, with about 17,000 inhabitants; Elmira with about 37,000 inhabitants; and Cortland with about 13,000, are the most populous places. Groton has about 1200 inhabitants and Moravia about 1300. The other points have less than 500 each.

The schedule problem with the railroad company is chiefly to afford connections for its patrons with its main line at Sayre or Van Etten, and with the Auburn branch of the New York Central at Auburn, and the main line of the New York Central at Canastota. There are, however, less important connections at some other points. In order to afford these connections for patrons of both divisions the trains are scheduled as at present: trains each way on each division meeting at Freeville about 9:30 a. m. and about 6:20 p. m. Trains have been operated substantially on this schedule for a great many years. The public is accustomed to the arrangement and people along the two lines have largely adjusted their affairs with reference to it. The time of the Freeville meets is substantially fixed by the

schedules of main line trains and New York Central trains. The inconvenience resulting from destroying this arrangement would be vastly greater than the inconveniences to which the complainants are subjected by reason of not having an earlier train to Auburn and a later train out of Auburn. Indeed, it is not probable that the complainants themselves would feel that their general needs were served by making a radical change in these trains and destroying their present connections. The noon train from Cortland to East Ithaca, East Ithaca to Cortland, and Freeville to Auburn, is a great convenience as it affords eastern connection with the Empire State Express at Syracuse. To abandon it would be to disregard the convenience of all the communities served. It is perfectly clear that if the wants of the complainants are to be satisfied it must be by an additional train leaving Cortland approximately at 6:30 a. m., and proceeding directly to Freeville and Auburn so as to arrive in Auburn before 9 a. m. Returning, it would leave Auburn after the arrival of train No. 11 on the Auburn road of the Central which is now at 6:32 p. m. There was a little evidence tending to show overcrowding of existing trains. It is probable that this may occur under special circumstances. The evidence, however, as to the number of passengers carried shows that there can be no general condition of overcrowding, and the writer of this opinion has sufficient occasion to use some of the trains in question to justify the statement that the event must be extremely rare. An extra car on such occasions would remedy such a condition. An additional regular train for any such purpose would be absurd.

The real complaint is that passengers bound to Auburn from Cortland and intermediate points can not under existing conditions reach Auburn until 10:58 a. m. Cortland is in Cortland county; McLean, Freeville, and Groton are in Tompkins county; Moravia and Locke are in Cayuga county, of which Auburn is the county seat. People in Moravia and Locke having occasion to go to Auburn on

judicial business are undoubtedly placed at a great inconvenience by not being able to leave their homes in the morning and reach Auburn at the time the courts open. There are between Moravia and Auburn a number of stations on Owasco Lake used largely by residents of Auburn who have summer cottages near the stations. An early train into Auburn would certainly add to their comfort but they do not seem to complain. There are certain industries at Cortland and Groton employing traveling salesmen who reside at those points. Some salesmen also reside in Moravia. These salesmen desire to get to Auburn in time for earlier connection with the New York Central. Shoppers from all the points desire occasionally to go to Auburn or to Syracuse. Under present arrangements they can go to Auburn and have about six hours there for shopping purposes. They suffer no hardship in being restricted to six hours. Residents of Cortland can reach Syracuse by the Delaware, Lackawanna and Western and have ample time for shopping and other purposes. Those residing between Freeville and Auburn and desiring to go to Syracuse find their time limited. They can not leave Auburn on the New York Central until 11:59 a. m., arriving at Syracuse at 1:15 p. m.; and they must leave at 2:36 p. m. and wait in Auburn from 3:34 until 4:50. They may, however, extend this time by using the Auburn and Syracuse electric railroad. In view of this situation it is somewhat curious that certain Auburn merchants appeared at the hearing in support of the complaint. It is asserted that the inconvenience caused by the late arrival of the first train in Auburn is so great that many people, especially traveling men, hire automobiles to take them to Auburn. Support is lent to this by evidence offered by the railroad company that the average number of passengers carried from Moravia to Auburn on the morning train from August 12 to September 10, 1915, was fifteen a day, and the average number carried from Auburn to Moravia on the late

afternoon train was twenty a day. It does not, however, follow that five passengers a day took automobiles from Moravia to Auburn and returned by train. It must be remembered that there is a train in the early afternoon which doubtless carried some passengers to Auburn who returned on the 4:50 train. This phase of the case may be summed up by the statement that an earlier train into Auburn and a later train out of Auburn would undoubtedly serve the convenience of a considerable number of patrons but that the existing service satisfies their necessities.

There was much evidence relating to the revenues of the existing trains and the expenses of operation. This is important only as throwing light on the probable revenue and cost of an additional train. The evidence bearing directly upon the subject of cost of operation tends to show an actual operating cost of an additional train of 54 cents a train-mile. The respondent claims that there should be added to this a proportion of general railroad expenses and overhead, and also 81.5 cents for extra telegraph operators which it is claimed would be required. The figures on extra operators can not be accepted because based upon the theory that extra operators would have to be supplied at practically all stations on both divisions. These might have to be supplied were the schedule of existing trains changed to meet the demand of the complainants. Some extra operators might be required to meet the longer hours of operation if instead of changing existing schedules a train were added as proposed. The record does not enable us to determine the amount of this expense. Undoubtedly there would be some addition to station expenses and some additional general expense but we have not the basis for computation. It would not be proper to allocate to this additional train for the purpose of this inquiry its proportion of the railroad's fixed charges and so called overhead expenses. The actual increase of such charges because of adding this one train would be inconsiderable. The 54 cents per train-mile for actual out-of-

pocket operating expenses must be accepted. It is not disproportionate judged by evidence in other cases relating to trains similar in character. Taking two cents and a-half per mile as the average revenue per passenger, it would require twenty-two passengers a car-mile to meet this operating expense.

From August 6 to September 9, 1915, the average number of tickets sold from Cortland to Auburn and intermediate points was 26 per day; from Auburn to Cortland and intermediate points, 50 per day. Of the latter, 16 were sold to Owasco Lake points and indicate exclusive summer travel. From August 23rd to August 28th the revenue per train-mile on existing trains was 57 cents from passengers between Cortland and Auburn and intermediate points; and for the same period the average revenue per train-mile for all trains operated on both divisions, including all points, was 90 cents per train-mile. It might be that the train desired would in itself meet this bare operating expense, but its revenue would to a very large extent be taken from that of the existing trains. It is impossible to reach the conclusion that the additional travel carried by adding the train would even approximately meet the bare out-of-pocket operating expense, to say nothing of expenses we are not able to calculate but which undoubtedly would exist.

It must not be inferred that a railroad should not be required in any instance to operate a train the operation of which taken alone is unprofitable. On the contrary, the proper service of the public may frequently require the operation of certain unprofitable trains. Here, however, we have a case where the total train service, whether judged by the actual number of passengers carried or by comparison with local service in other parts of the State and of the country, seems to be adequate; where the additional service is sought by a limited number of patrons because of convenience and not of necessity; where the additional service would almost certainly be unprofitable in itself and would

decrease the revenues of trains already operated. Moreover, there is evidence to show that the entire passenger traffic of the two divisions concerned is conducted at a loss. Under all these circumstances it seems clear that the Commission should not require the railroad to afford the additional service, and that if it should undertake so to do the order could not stand the scrutiny of court review.

While therefore the case must be dismissed, it presents a typical instance of a general condition which should have the immediate and earnest consideration of the railroad companies. The decrease in local passenger traffic has caused much uneasiness and considerable discussion. The general policy so far pursued has been that reflected in an address by the president of an important road who has otherwise given evidence of his sense of responsibility to the public. This policy is "to offset, so far as we can with propriety, this fall in business by wise economies and reasonable curtailments of service". "Wise economies" are always desirable; "curtailments of service," reasonable or unreasonable, are not always the means of improving conditions. The State of New York, to a greater extent than most States, has been engaged in the improvement of its highways. The system has reached such a development that most points of travel may now be reached by highway throughout all seasons. Concurrently with the decrease in local passenger travel there has come a development of the automobile. A few years ago the summer toy of the rich man, it has now become the convenient passenger and freight vehicle for almost all classes. It is safe to assume that its use will not diminish. Men experienced in railroad affairs constantly connect the rise of the automobile and the fall in railroad local passenger traffic as cause and effect. The electric railroads, although they themselves feel keenly the results of automobile competition, are also active and effective competitors with the steam roads for local travel. In short, the familiar local train, composed of locomotive, baggage and express car, and

two or three coaches, is in a state of obsolescence. Those who can find other means of transportation are unwilling to use trains which make frequent stops and long stops for the purpose of handling express and mail matter. Such trains carry only those who have no other available means of transportation. Some cheaper, faster, and more comfortable method of transporting local passengers must be adopted or else the railroads must continue to transport them at a loss in spite of wise economies and in spite of reasonable curtailments of service. As already stated, experience under conditions prevailing in this State is insufficient to demonstrate that the gasoline car is the proper means of supplying the demands of the public for local transportation with a fair return to the carrier. It is not altogether creditable to the enterprise of the carriers that experience is so limited. The stretches of road we have been considering are not unfavorable to experimentation of this character. It is possible that the Lehigh Valley Railroad Company might not only meet the convenience of the complainants in this case but aid materially in affording a solution of the local passenger problem if it should by actual experiment determine whether or not the solution lies in the direction indicated. There is evidence in the record that gasoline cars have been operated on the Central New York Southern between Auburn and Ithaca at an expense of less than twenty-nine cents per mile. This operation, however, has not continued long enough to determine the important factor of depreciation. If the solution does not lie in gasoline it must be found elsewhere, and it is high time that this and other railroads should seek it.

In the Matter of the Petition of LEROY D. BECAFT, under Chapter 667 of the Laws of 1915, for a certificate of convenience and necessity for the operation of a stage route by auto busses in the city of Corning. [Case No. 5263.]
 In the Matter of the Petition of JAMES E. ADAMS, under Chapter 667 of the Laws of 1915, for a certificate of convenience and necessity for the operation of a certain stage route by auto busses in the city of Corning. [Case No. 5282.]

Section 25 of the Transportation Corporations Law, in so far as it required a certificate of convenience and necessity for the operation of an auto bus over state highways, was repealed by Chapter 667 of the Laws of 1915, and such auto busses may now be lawfully operated over state highways without obtaining such certificates from the Public Service Commission.

It is now provided by Chapter 667 of the Laws of 1915, that in order to lawfully operate an auto bus for the carrying of passengers over any route which covers city streets, the owner must obtain a permit therefor from the local authorities, and must also obtain a certificate of convenience and necessity from this Commission.

The petitioners herein have obtained such individual permits, and asked the Commission for certificates of convenience and necessity to operate specified routes within the city, which are part only of their through routes extending beyond the city line.

Held, that such certificates should be granted, even though it appears that another existing public utility, a street railroad line, would probably suffer the loss of some revenue by such competition; and although it is the function of the Commission to prevent to the full extent of its power all unjust competition with or all unfair assaults upon the business and invested capital of a public service corporation, yet this rule is not so extensive in its application so that all competition shall be considered unjust, or for one to engage in a perfectly legitimate undertaking shall be considered an invasion of the vested rights of another.

Held also, that the convenience and necessity which are sought to be satisfied herein are not confined to the residents of Corning alone, but relate also to the public generally, as the use of the through routes

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of the petitioners require continuous transportation in and through the streets of the city from suburban points.

Decided February 1, 1916.

Appearances:

W. J. & G. W. Cheney (Guy W. Cheney, counsel), Corning, N. Y., attorneys for petitioner, LeRoy D. Becraft.

Claude V. Stowell, Corning, N. Y., attorney for petitioner, James E. Adams.

Stanchfield, Lovell, Falck & Sayles (Ross Lovell, counsel), Elmira, N. Y., attorneys for the contestant, Corning and Painted Post Street Railway.

Hodson, Commissioner:

The petitioners herein have asked the Commission for separate certificates of convenience and necessity for the operation of their respective auto bus routes over certain streets in the city of Corning, and, in making decisions in these cases, they will be considered together because they were heard at the same time, the points raised by the contestant in each case are largely the same, and they both relate to auto bus routes in the city of Corning, although such routes are partially different.

The proposed route contained in the Becraft petition runs "from the city line of Corning at Park avenue and Cohocton street in a northerly direction and Market street in a westerly direction to State street; thence northerly on State street and Bridge street, across the bridges over the New York Central Railroad tracks and yards, and the Chemung river, to Pulteney street, and thence westerly along Pulteney street to the westerly city line of Corning". The route set out in the Adams' petition is identical with the Becraft route between the city line and Park avenue and the corner of Bridge and Pulteney streets, but at that point the Adams' route continues in a northerly direction along Bridge street to Perry avenue, there turning on Perry avenue and running easterly to Baker street, and thence

along Baker street to the northerly city line of Corning. The Becraft route continues from the westerly city line of Corning, along an improved state highway to the corner of Water and Hamilton streets in the village of Painted Post, a distance of about one mile. Along this highway there are many residents, and about midway between the westerly city line of Corning and the terminus of such route in the village of Painted Post, there is located a large club house which is maintained by the Ingersol-Rand Co. for the benefit of the employees in its plant in Painted Post, where 775 men are employed, and about 50 of whom also live in the city of Corning, two or three miles from their place of employment. At the present time the only means of transportation to and from their work is the Corning and Painted Post Street Railway, with a round trip service every 48 minutes between the corner of Pine and Market streets, Corning, and Painted Post, from 6:05 a. m. to 11:24 p. m., except that the run between Brown's crossing, the easterly terminus of the line to the Painted Post terminus occupies 36 minutes, and the last car leaves Brown's crossing at 11:24 p. m., runs to The Delaware, Lackawanna and Western Railway Company's station and back to the corner of Bridge and Pulteney streets, where it turns westerly and goes to Painted Post, leaving that place at 12:35 and running to the car-barns of the railway company. Besides this service there is a limited passenger train service during the day and evening, between these municipalities, on both the Erie and the Lackawanna railroads, the station of the former being about a-quarter of a mile from the center of the village of Painted Post and the latter is about one-half a mile away; while in Corning the Erie lands its passengers in the very center of the residential and business section, near the corner of Pine and Market streets, and the Lackawanna station is at least a mile from the point mentioned.

The street railway company makes vigorous opposition in both these cases, and alleges that by reason of the fact that both proposed routes parallel its street car lines substantially

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all the way, the company would suffer financially in case the petitioners should receive certificates of convenience and necessity from the Commission.

Considerable proof was furnished by the contestant at the hearings which informs the Commission as to the financial condition of the railroad company, together with the extent and character of its road and equipment, and its situation generally, as regards the municipalities which it traverses and serves.

It appears from such proof that the operating expenses of the company for the three years last passed, were —

For the year ending June 30, 1913.....	\$54,012.36
For the year ending June 30, 1914.....	44,671.17
For the year ending June 30, 1915.....	49,148.94

These figures exclude all payments made by the company for taxes, extensions and betterments, which were considerable during these years, including special paving taxes and expenses for relaying of tracks. For the same periods, the gross income of the company was:

1913	\$72,649.31
1914	64,157.25
1915	49,018.53

There were other facts produced which, in addition to the above showing, clearly demonstrates that the business of the railroad company is far from prosperous; and this is urged as a special reason why the Commission should refuse to approve of any plan which would materially reduce its income. On the other hand, it seems to have been determined by the local authorities of the city of Corning that the transportation offered by these two petitioners by means of auto busses, is necessary to satisfy the requirements of the traveling public in and through the streets of the city.

This appears from the action of the common council in granting a permit for the operation of such auto busses in each case, after public hearings were held concerning the same. It is fair to assume that such action would not have been taken by the official representatives of the people of the city unless there was some real demand therefor. In

addition to this, there was presented at the hearing a written request signed by many residents of Corning and vicinity, that the Becraft route from Brown's crossing to Painted Post be approved by the Commission, and stating that such bus line is required to give proper service to the people of the territory through which it passes, and that there was absolute satisfaction with the Becraft service over this route, before such service was discontinued at the direction of the Commission. The last state census shows that the city of Corning has a population of 13,459, and Painted Post has 1319. The latter place, as well as its immediate surrounding territory, is really a suburb of Corning, and the people of both places may be considered as intimately connected by social and business relations. A very striking illustration of this is found in the fact that many of the employees of the Ingersol-Rand Company live in Corning and work in Painted Post.

Under all these circumstances it would be a denial of justice to say to the people of this locality that, because the Commission is clothed with discretion in matters of this kind, we should withhold approval of a proper, lawful and inexpensive means of public transportation into and through a city, after the officials and people of such city have declared in favor of the same, simply because another existing public utility might not reap the same rewards for its enterprise as it would if competition should be prevented.

True, it is the function of the Commission to prevent to the full extent of its power all unjust competition with and all unfair assaults upon, the business and invested capital of a public service corporation; but this rule cannot be so extensive in its application that all competition shall be considered unjust, or that for one to engage in a perfectly legitimate undertaking shall be considered an invasion of the vested rights of another.

The legislature has recognized that the automobile, in its various uses, has come to stay. This is shown in the enactment of the statute which makes this proceeding pos-

sible. It is also apparent in the expenditure of an enormous amount of money by the state to improve the highways; and in these very cases, the proof shows that there is a brick pavement over the highways and streets for almost the entire length of both routes. Confessedly, these pavements were laid for the convenience of the traveling public, and particularly for the use of automobiles; but it should not be contended that the traveling public, in making such use of the highways, should be restricted to the operation of their own automobiles, and not be permitted to be transported from place to place in the automobile of another by paying a reasonable charge therefor.

The company operates 5.254 miles of a single track street surface railroad from Brown's crossing in the town of Corning, to the Lackawanna station, and to the village of Painted Post in the town of Erwin. Of this line 3.434 miles are in the city of Corning, 1.21 in the town of Corning, .51 in the town of Erwin and village of Painted Post, and .10 on private right of way.

This private right of way traverses the territory in the towns of Corning and Erwin, where the car line leaves the state highway at or near the dividing line between such towns and runs northerly and then westerly until it reaches the streets in the village of Painted Post, and continues to the four corners in such village, which is also the terminus of the Becraft route.

The territory in this locality between the company's tracks and the state highway is from 548 to 805 feet wide, and about 5115 feet long. Running through the center of this strip are the main line tracks of the Erie Railroad, and in only one or two instances are there any cross streets over which the people living on the highway can reach the trolley cars, and these crossings are not much traveled; so that, as a matter of safety, such people desiring to take such cars either way, are compelled to go either to Painted Post, or to the Corning city line where such railroad leaves the state highway. There are many people living in this locality

whose convenience is entitled to consideration, and they have with substantial unanimity asked the Commission to give them the opportunity to go back and forth in the Becraft bus, along the brick highway which the state has provided.

These are considerations applying particularly to the Becraft route; in many respects they are equally applicable in the case of the petitioner, Adams, who asks for the approval of a route the same as the Becraft route, except that at the corner of Bridge and Pulteney streets the Adams' route continues along Bridge street in a northerly direction to Perry avenue, along Perry avenue to Baker street and via Baker street to the northerly city line of Corning; while the Becraft route turns at that corner and goes in a westerly direction to the westerly city line, and from that point continues along the state highway to its terminus in the village of Painted Post. The basis of the Adams' application is the necessity of the workmen at the New York Central shops to go to their work from their homes, and many of them live a mile away from such shops and across the Chemung river and the Central railroad tracks which divide the city of Corning about equally; and this distance is about doubled if such workmen follow the streets of the city of Corning to go to their work, for there is no direct and convenient passage way across such river and tracks which may be used by them; and even if they should all take the cars of the street railway company in going back and forth, they would still be required to walk a distance of one mile between Bridge street and the place of their employment. Upwards of 500 people are employed at these shops, many of whom live on the opposite side of the city, and the evidence shows that, while Adams was operating this route, he carried between 160 and 200 men in his busses every day. It will be observed, in this connection, that the street car schedule does not continue after about 12:30 at night, and from that time on through the early hours of the morning, many of such workmen are required to report for train duty at such shops, while others desire to return to their homes across

the city; and the petitioner, Adams, intends to make round trips with his busses over his proposed route during every hour of the day and night, so that these workmen, requiring such transportation, may be accommodated; and the chief object of the petitioner, Adams, in operating such proposed route, is to serve such workmen in carrying them between their homes and their work. The petitioner, Becraft, also disclaims any intention to carry passengers in his auto bus from one point to another in the city of Corning, but intends to carry only through passengers from any point in the city of Corning to any point outside of the city, as far as the terminus of his proposed route in the village of Painted Post.

For two years prior to the enactment of Chapter 667 of the Laws of 1915, section 25 of the Transportation Corporations Law vested in this Commission authority to grant certificates of convenience and necessity for the operation of auto busses over state highways; but the law of 1915 repealed that provision, so that, since May 22nd of that year, any such auto bus owners, previously requiring such certificates from this Commission, have been permitted to operate their auto busses over state highways without any let or hindrance from this Commission or any other body, and subject only to such regulations as may be prescribed by the State Commission of Highways, pursuant to the provisions of section 24 of the Highway Laws of the state. It is obvious, therefore, that the petitioners herein may lawfully operate their busses along the streets and highways covered by their proposed routes which lie outside of the city; and if they should do so, and thus bring passengers to the city line, such passengers would then be subjected to the necessity of continuing to their point of destination in the city by some other means, while passengers within the city, desiring to go outside of the city or to the end of either of such routes, would, if these applications be denied, be compelled to reach the city line of Corning before they would have the right to employ the aid of these busses to carry them to the village of Painted Post, the New York Central shops or any intervening points out-

side of the city. Such a practice would be intolerable and could not be justified under the circumstances here presented; for it must be conceded that the streets of the city of Corning are maintained for the public generally, and are entitled to be lawfully used by those living outside as well as inside of the city; and the city authorities have determined in what manner these petitioners may lawfully use such streets.

The convenience and necessity, which are sought to be satisfied herein, are not confined to the residents of Corning alone, but relate also to the public generally, in so far as the through routes of the petitioners are required for continuous transportation in and through the city. True, the law now limits jurisdiction of the Commission, in the matter of granting certificates, to the streets, avenues and public places in any city; but that limitation does not preclude the consideration of proposed routes in their entirety, where it is made to appear, as in these cases, that suburban travel over a part of the line is not properly accommodated unless the same may be continued over the city streets. But in reaching this conclusion, we desire to emphasize the fact that the Commission cannot deal with any question touching the conduct of a stage route, bus line or motor vehicle line or route which is operated wholly without the limits of a city.

In addition to the general opposition of the street railway company to these applications, a specific objection is made in both cases, that the permit granted by the city of Corning to each petitioner is irregular and void, for the reason that the statute was not complied with by the common council, in the various steps taken by that body, and, particularly, that the notices of hearing upon the application for such permits were not published in the manner and for the time prescribed by law.

It will be noted that the permit required to be obtained from the common council in cases of this kind is not, in any sense, the basis of an application to the Commission for a certificate of convenience and necessity. They are separate

and independent, although both must be obtained before an auto bus may be operated. And this Commission holds that the regularity of the proceedings in obtaining a permit, and the legality of the permit itself, should be left for the courts to determine, in case the same shall be assailed.

*Matter of Gray, decided by this Commission, Oct. 20, 1915.
Opinion by Emmet, Commissioner.*

At the same time these cases were heard by the Commission, evidence was also produced in a case against the Corning and Painted Post Street Railway on the complaint of residents of Corning and Painted Post, concerning poor equipment and inadequate service of the street railway; but in making this decision it is not deemed necessary to specifically refer to that case, or the proof relating thereto, because the decision of these two cases is made squarely upon their merits, irrespective of the kind of equipment possessed by said company or the character of the service it renders.

The Commission should, therefore, grant a certificate of convenience and necessity to each of the petitioners in these cases, but in the exercise of the rights so conferred, the same should be limited to through passengers only as hereinbefore indicated.

All concur.

In the Matter of the Complaint of JOHN E. JUDGE of Plattsburgh *against* PLATTSBURGH TRACTION COMPANY as to non-operation to Bluff Point during the winter months. [Case No. 5255.]

1. A street railway company will not be required to extend the operation of its cars during the winter months for the purpose of developing real estate and improving the value thereof when there is not sufficient traffic to warrant the operation of cars over that portion of its lines where the service is desired.

2. The operation of street cars thirty minutes apart in a small city for the purpose of carrying local traffic, where no other street car service is given, would be inconvenient to the public and unremunerative to the company.

3. The duty of the Commission is to require service where the same is necessary for the convenience of the public and the traffic warrants it, but not otherwise.

Decided February 1, 1916.

Appearances:

John E. Judge, Esq., in person.

William L. Pattison, Esq., on behalf of respondent.

CARR, Commissioner:

The complaint in this case asks that the Commission require the Plattsburgh Traction Company to operate its cars each and every day of the year as far south as the southern limits of the city of Plattsburgh. It was filed with the Commission on October 18, 1915. The answer of the respondent was filed on November 9, 1915. It alleges that the service which the complainant desires would entail an unreasonable and unnecessary expense and that there is not sufficient traffic to warrant the operation of the cars as requested by the complainant.

A hearing was held in the city of Plattsburgh on January

8, 1916, at which it developed that there was practically no difference of opinion between the parties as to the facts.

The United States Military Reservation at Plattsburgh is bounded on the north, south, and west by the city of Plattsburgh, and on the east by Lake Champlain. That portion of the city lying south of the Military Reservation is a narrow strip running to the lake. On this strip and along the Lake Shore road are a few houses, about twelve in number, one of which is just outside the limits of the city. The complainant owns about ten acres of land in this portion of the city of Plattsburgh and four houses which are situated adjacent to the Lake Shore road. At the time of the hearing there were twelve families residing in these houses, several of which were families of soldiers belonging to the 30th Infantry now stationed at the Plattsburgh Barracks. During the months of November, December, January, February, March, and April, the Traction company does not operate its cars south of a point on the Lake Shore road about opposite the drill hall. That portion of the Lake Shore road from Peru street to the southern boundary line of the city of Plattsburgh is on the Military Reservation, and the operation of cars over this road is pursuant to authority granted by the War Department of the United States. The boundary line of the village of Plattsburgh formerly crossed the Lake Shore road about opposite the guard house, which is 380 feet northerly from the drill hall where the cars of the respondent now stop during the winter months. The southerly boundary line of the present city of Plattsburgh crosses the Lake Shore road 3488 feet south of the drill hall. The respondent is operating its cars in the city of Plattsburgh pursuant to the provisions of a franchise granted by the board of trustees of the Village of Plattsburgh in 1896, and as above stated, it is operating on the Lake Shore road through the Military Reservation by consent of the War Department. The respondent also has a franchise granted in 1896 by the commissioner of highways of the Town of Plattsburgh covering the operation of its cars from the village

of Plattsburgh over the Lake Shore road to Bluff Point. The respondent gives a twenty-minute service over its line in the city of Plattsburgh during the winter months, which includes the operation of cars to the drill hall above referred to. By the operation of a loop in the city of Plattsburgh it is enabled to give this service with two cars. The distance from the drill hall to the first house south thereof on the Lake Shore road is 2133 feet. The highway for practically that entire distance is bordered on one side by woods, and on the other by a mule corral, both on the Military Reservation.

The contention of the complainant is that the cars should be operated during the winter months as far south as the property owned by him, as otherwise the value of his property is depreciated. It appeared on the hearing that all of the houses were rented at that time and that this was probably due largely to the demands of the army people stationed at the Plattsburgh Barracks. The Traction company has never operated its cars during the winter months south of the drill hall. The complaint as developed at the hearing showed that it was not made by residents of that portion of the city in question, but rather that the complainant desired to have the cars operated so as to improve the value of his real estate. Several of the male adults in the families living south of the Reservation, as above mentioned, are soldiers in the United States army, and it is fair to assume that they would seldom if ever ride in going from their houses to the Barracks, a distance of approximately half a mile. In addition to this, one of them who was introduced as a witness on behalf of the complainant testified that ordinarily he would probably not use the trolley even if it ran as far south as his house. Another witness testified that one of her children would use the cars frequently if the facilities were afforded and that she also would use them to go into town. Several other witnesses testified that they would probably use the cars occasionally from the southerly portion of the city if they had the opportunity so to do.

The general manager of the respondent testified that in order to give the service demanded by the complainant it would be necessary to either lengthen out their headway in the city of Plattsburgh to thirty minutes, or to put on an additional car if it was necessary to maintain the present twenty-minute schedule. If the company were required to put on an additional car, the expense for operating the same would be about \$12 a day. In addition to this there would also be other overhead expenses to be considered if this extra car were placed in service. He also testified that during the winter months the operating expenses per mile were 15.02 cents, and the operating revenue per car-mile was 15.18 cents. These figures do not make any allowance for fixed charges and other overhead expenses. He further showed that the company sustained a substantial loss in the operation of its cars during the entire winter season, and this has been the case for a number of years. In his opinion it would not be proper to attempt to speed up the cars so as to attempt to give the service desired south of the drill hall. While this could probably be done, yet it is a question whether or not it is warranted or justified, as he claims that the cars are now being operated in the city as fast as they should be under good operating conditions. The question of whether or not the company is complying with the terms of its franchise is not involved here, because the franchise covering the present operations in the city specifically provides for the operation of cars over the constructed line within the corporate limits of the village of Plattsburgh, and excepts such operation on a portion of certain streets. This franchise did not cover that portion of the city in which the complainant's property is located. There is also no requirement in the franchise granted by the Town of Plattsburgh as to the operation over the Lake Shore road in the town of Plattsburgh. The only question, therefore, is one of service, regardless of the franchise conditions.

It requires no argument to support the statement that a headway of more than twenty minutes in a small city like

Plattsburgh would be extremely detrimental to both the traveling public and the company. A thirty-minute headway would result in such inconvenience to the traveling public that the company would lose a very large amount of business, particularly where people are able to walk to their destination in much less time than it would take to wait for a car. Neither does it require any argument to support the statement that the operation of cars for a distance of 3488 feet south of the drill hall on the United States Military Reservation at Plattsburgh would entail a substantial increase in the operating expenses of the company. If the forty occupants of the houses in the district in question should use the cars twice a day, the total daily revenue to the company would be \$4. On the other hand, general observation in matters of this character shows that the percentage of inhabitants in this district who would ride daily would probably not exceed 20 per cent. It can readily be seen that the revenue which the company would derive from the additional operation desired would be practically nothing, and that the Commission would not be justified in requiring the operation of cars for this traffic. There is no doubt but what it would be convenient for the people in question to have the service, but upon the state of facts presented, would the Commission be justified in requiring it? We do not think that the facts in this case would make it possible for us to justify such an order. It is significant that this complaint was not made by any of the parties who would use the cars, but rather by an individual who is anxious to develop his property and improve the value thereof by having street car facilities. Of course the Commission can not require a traction company to extend its lines for the purpose of developing real estate; that is too well settled to require any argument. The Commission has power to require service where such service is necessary for the convenience of the public, but not otherwise. Undoubtedly, if this territory should develop and the population become sufficient there to warrant the operation of the cars, the company will

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see that this is done without any order from this Commission. Under the circumstances of this case, therefore, the complaint must be dismissed, and an order to that effect should be entered in due course.

All concur.

In the Matter of the Application of THE LONG ISLAND RAILROAD COMPANY for an order authorizing it to issue debentures not to exceed in amount \$16,500,000, pursuant to section 55 of the Public Service Commissions Law. [Case No. 1080.]

1. Matters relating to the issue of securities for capital or other lawful purposes, which, under the statute, corporations are compelled to submit to the Public Service Commission for its approval, are entitled to the earliest attention which in the proper exercise of both its duty and discretion the Commission finds it possible to accord.

2. When a corporation has, in the opinion of the Public Service Commission, established its right to issue securities of a character, in an amount, and for a purpose which the Commission deems proper, and has complied with all the incidental accounting requirements of the Commission, and no evidence in dispute of the Commission's conclusions has been presented or offered, other than may be derived from the pendency of an equity suit against said corporation in which minority stockholders seek to establish, among other things, that the indebtedness to discharge which the said securities are to be issued was improperly incurred by the directors of the applicant corporation; *held*, that an adjournment of the proceeding until determination of the equity suit, and consequent delay in granting the relief to which it has been determined by the Commission that the applicant is entitled, would be an unwarranted exercise of discretion by the Commission, because in its direct consequences such adjournment would, under all the circumstances, be tantamount to restraining the applicant from the exercise of a substantial right against which it may properly be enjoined only by a court of competent jurisdiction.

Decided February 3, 1916.

Appearances:

Joseph F. Keany and *Alfred A. Gardner* for petitioner.

Kellogg & Rose (by *Abram J. Rose* and *Alfred C. Pette*) for *Dick Brothers & Co.*, stockholders in *The Long Island Railroad Company*.

VAN SANTVOORD, *Chairman:*

Under date of August 22, 1913, *The Long Island Railroad Company* applied to this Commission for approval of an

issue of \$2,942,059.84 in amount of its 4 per cent ten-year debentures at par, to be delivered to The Pennsylvania Railroad Company in payment for advances from the last mentioned corporation to the applicant corporation, which advances had been expended for capital account during the calendar year 1911; and under date of August 13, 1914, applied for similar approval of an issue of \$3,986,319.63 in amount of its said debentures, to be delivered to The Pennsylvania Railroad Company in payment for advances to the amount mentioned from that corporation for capital expenditures by the applicant during the calendar year 1912. The relief prayed for in these petitions was subsequently enlarged by the applicant corporation so as to include approval of an additional issue of \$6,866,818.01 of said debentures, to be used in the liquidation of a similar indebtedness to The Pennsylvania Railroad Company incurred through advances for capital expenditures down to June 30, 1914: making a total amount of debentures thus proposed to be issued of \$12,996,356.49.

The aforesaid applications were supplemental to similar applications which had theretofore been made by The Long Island Railroad Company for approval of the issue of approximately \$6,000,000 of said debentures to The Pennsylvania Railroad Company in liquidation of the applicant corporation's indebtedness to said The Pennsylvania Railroad Company for advances made to The Long Island Railroad Company, and by the latter expended for capital account down to December 31, 1910, which applications had been duly granted by this Commission.

Before passing upon the pending application, the Commission directed its division of capitalization and its engineers to examine the accounts and property of the petitioner and report the additions and betterments which it had made since July 1, 1907, as of which date the general accounting order of the Commission, commonly spoken of as the "Uniform System of Accounts," had become effective.

This necessitated an analysis by the examiners of over \$25,000,000 of expenditures on the property, and examination by the engineers of the property represented by such expenditures. These examinations, which were exhaustive, included a careful analysis of the accounting methods of the company to ascertain whether such methods resulted in correct distributions of said expenditures between capital and expenses. Similarly, the accounting for the equipment was carefully inquired into, to ascertain whether retirements had been properly recognized, and also whether adequate accruals for depreciation were being made.

The result of these examinations as embodied in the engineer's report under date of April 26, 1915, and the report of the division of capitalization under date of December 27, 1915, convinced this Commission that after making all proper adjustments in its accounts as required by the Uniform System of Accounts and set forth in the report last above mentioned, The Long Island Railroad Company had expended between January 1, 1911, and June 30, 1914 (the period covered by the pending applications for reimbursement), the sum of \$11,996,356.49 for additions and betterments to its property; and had, furthermore, paid instalments on its equipment trust to the amount of \$1,000,000, making a total of \$12,996,356.49 which had thus been expended for capital purposes.

Examination of the books and property of the applicant corporation and its acceptance in full of the accounting requirements of this Commission having been thus satisfactorily accomplished, and the said reports plainly indicating that the applicant corporation had actually expended the sum of money last mentioned for legitimate capital purposes and was accordingly entitled to issue a like amount of its securities for the purpose of liquidating its obligations incurred in making such expenditure, no formal hearing upon the application became necessary or was required under the Rules of Practice and in the ordinary procedure of this Commission.

But under date of January 16, 1915, Messrs. Dick Brothers and Company of New York, in behalf of about thirty per cent of the outstanding stock of The Long Island Railroad Company, had informally protested to this Commission against the alleged improper control by The Pennsylvania Railroad Company of The Long Island Railroad Company, and against the approval by this Commission of any increase in the indebtedness of said The Long Island Railroad Company either by sales of securities to the public or by the procuring of loans from The Pennsylvania Railroad Company without notice to this Commission, to the end that said minority interests might appear before the Commission and protect its rights. Under date of January 21, 1915, said Dick Brothers and Company were accordingly advised by this Commission of the pendency of the first above mentioned applications by The Long Island Railroad Company for authority to issue debentures, etc., to the amount of seven millions dollars approximately, and were also advised that they would receive reasonable notice of hearing upon such applications; and on January 17, 1916, they were finally notified of the facts and conclusions above recited, and advised that if they desired an opportunity to make any presentation to the Commission in connection with the pending applications and before a final disposition thereof a hearing would be fixed for the 28th of that month. They were further advised that the above mentioned reports were available for examination. No objection was made to the date fixed for the hearing, but when the case was called counsel for Dick Brothers and Company appeared and asked for an adjournment upon the following grounds:

That an action had been commenced by Dick Brothers and Company on behalf of the minority stockholders of The Long Island Railroad Company against The Pennsylvania Railroad Company and others, in which the following relief is sought:

1. An accounting by the directors of the management and affairs of the company and of all moneys spent in alleged improvements and betterments since the year 1901.

2. The cancellation of an indebtedness of \$27,000,000 for moneys advanced by the Pennsylvania Company to the Long Island Company for improvements and betterments which it is claimed were made in the interests of The Pennsylvania Railroad Company.

3. The cancellation of an agreement between the Pennsylvania Tunnel and Terminal Railroad Company (a subsidiary of The Pennsylvania Railroad Company) and the Long Island Company for the use of the tunnel into the Pennsylvania Station at 34th street, and the use of such station, under which agreement passengers are carried into said station by The Long Island Railroad Company at a loss.

4. An accounting of all moneys, amounting to approximately \$10,000,000, expended in the improvement of the so called Bay Ridge Branch, which improvement has been made largely, if not entirely, for the benefit of the New York Connecting Railroad Company, in which The Pennsylvania Railroad Company and The New York, New Haven and Hartford Railroad Company are equal owners of the stock, and the restitution to the Long Island Company of the moneys spent in carrying out such improvements.

5. The removal of the directors of the Long Island Company who are also directors of the Pennsylvania and constitute a majority of said board.

6. The restoration of the Long Island to its status as an independent company, and not merely a subsidiary of The Pennsylvania Railroad Company.

It was finally urged that in the opinion of counsel the facts developed on examinations before trial of officers of The Pennsylvania Railroad Company and The Long Island Railroad Company fully justify the institution of said action, and that if plaintiffs should be successful and should obtain substantially the relief sought the effect would be to relieve The Long Island Railroad Company of at least a portion of the large indebtedness which has been incurred by it during the past fifteen years, including the \$27,000,000 advanced to it by The Pennsylvania Railroad Company, to cover a portion of which advances the proposed debentures now under consideration are to be issued.

No testimony was offered, nor opportunity requested to

present any testimony upon the vital questions before this Commission, namely, whether the applicant corporation has actually and properly expended the sum alleged for capital account and whether its proposed method of liquidating the incidental indebtedness is reasonable and proper. Nor was it contended that if successful in its suit, the rights of the plaintiff would be jeopardized or in any degree affected by reason of a present issue of debentures by the applicant corporation as proposed.

Under these circumstances the Commission can find no adequate reason for granting an adjournment of this proceeding until the Supreme Court action shall have been tried and disposed of. Matters relating to the issue of securities for capital or other lawful purposes, which under the statute corporations are compelled to submit to the Public Service Commission for its approval, are entitled to the earliest attention which in the proper exercise of both its duty and discretion the Commission finds it possible to accord. In the present case, by force of circumstances nearly three years have elapsed since the initial application was filed. And now at the close of a laborious and painstaking inquiry by the Commission, and when the applicant corporation has broadly accepted and complied with all the accounting and other requirements of the Commission, which has accordingly determined that the relief prayed for properly may and should be granted, minority stockholders request that action shall be delayed and relief, to which, upon all the facts which it is the province of the Commission to ascertain, the applicant corporation is at once entitled, shall be withheld until the determination of a complicated equity suit, the result of which could not possibly either affect or be affected by present approval of the application. The record discloses that plaintiff in the equity suit has had knowledge for more than a year of the proposed issue of debentures by the applicant corporation, which is a defendant in that suit. The conclusion is irresistible that plaintiff would long since have

applied to the Supreme Court for a restraining order if really convinced that it was entitled to such relief and that otherwise its rights would be impaired. No such relief having been sought from the Court in which the suit is pending, upon what possible line of reasoning can it be predicated that this Commission should now by granting an application for adjournment do that which would practically operate as a restraining order? The functions of a court of equity are no part of the constitution of this Commission, which is a regulative body acting within precisely defined bounds, and whose broad discretionary powers should never be abused by an act which in its direct consequences would be tantamount to the exercise of a fundamental authority which has never been conferred upon it.

All concur.

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In the Matter of the Complaint of the BOARD OF TRADE OF THE VILLAGE OF MALONE *against* MOUNTAIN HOME TELEPHONE COMPANY as to rates, service, and other matters. Amended Complaint directed also against ADIRONDACK HOME TELEPHONE COMPANY and NEW YORK TELEPHONE COMPANY. [Case No. 4418.]

1. The law permits and has always heretofore permitted a telephone corporation to purchase the physical property of another telephone corporation without the consent of the Commission. The M. H. T. Company purchased the physical property of the A. H. T. Company and the physical property of the N. Y. T. Company. It also took over with the consent of this Commission a village franchise of the N. Y. T. Company, but did not take over the franchise of the A. H. T. Company. The latter company had operated under a franchise purporting to limit its rates. *Held*, That the M. H. T. Company was not in said village restricted to the rates attempted to be fixed by the A. H. T. Company franchise.

2. The A. H. T. Company had several years before the sale of its property to the M. H. T. Company increased the rates beyond those fixed by the franchise under which it was operating and there had been a general acquiescence in such increase. *Held*, That a demand interposed at this time upon a successor company to restore the original rates is stale.

3. After a telephone company has purchased the physical property of several other companies and some of their franchises, and with the consent of the Commission has issued stock and bonds to retire the outstanding securities of the original companies and for other proper corporate purposes, the Commission is without authority to dissolve the consolidation so effected and restore the various properties to the constituent companies from which such properties were obtained.

4. Except in the case of increases of rates by common carriers, the burden of proof in a rate case is upon the complainants to show that the existing rates are unjust and unreasonable. *People ex rel. N. Y. C. & H. R. R. Co. v. P. S. C.*, 215 N. Y. 241. *People ex rel. N. Y. Telephone Company v. P. S. C.*, 169 App. Div. 448.

5. In determining the reasonableness of telephone rates the Commission is required to pay due regard to a reasonable average return upon the value of the property actually used in the public service and the necessity of making reservation out of income for surplus and contingencies.

6. In ascertaining the value of property used in the public service it is immaterial whether that property was acquired by the issuance of stock or bonds, out of income or otherwise.

7. Evidence as to the value of property employed in the public service, revenues and expenses examined, and it being found that at the lowest valuation permitted by the evidence the return for 1914 was at the rate of $\frac{3}{4}$ of 1 per cent and for the first half of 1915 at the rate of $1\frac{1}{4}$ per cent, it was *Held*, That no reduction in rates could be directed.

8. In adjusting a schedule of rates in communities where the value to business subscribers of an extended residence service is important it is not improper that the business rates should bear some burden although the residence rates seem low by comparison.

9. Under the circumstances of the case it was held that a rate of \$9 per annum for business extensions was not unreasonable, but the telephone company was advised to study the expediency from the standpoint of business of decreasing the charge.

10. Certain toll charges examined and held not unreasonable, but the company was advised to study the desirability from a business standpoint of making certain readjustments.

11. Certain complaints as to service found to have been justified when the complaints herein were filed, but it was further found that pending the proceeding the company had effected improvements in its service and that no specific order for further improvements is now practicable.

Decided February 9, 1916.

Appearances:

Kellas, Geneway & Kellas (by J. P. Kellas and L. M. Kellas), Malone, N. Y., for complainant.

Thomas Spratt, Ogdensburg, N. Y.; *C. W. Artz* and *Paul H. Burns*, 15 Dey street, New York city; and *Howard Hendrickson*, Albany, N. Y., for Mountain Home Telephone Company, Adirondack Home Telephone Company, and New York Telephone Company, respondents.

H. E. Sweet, Madrid, N. Y., for Pomona Grange of St. Lawrence County.

T. J. Fitzpatrick, Chateaugay, N. Y., for Chateaugay Board of Trade.

IRVINE, Commissioner:

The Mountain Home Telephone Company operates in several counties in Northern New York and has exchanges in a number of places, including the villages of Malone, Canton, Potsdam, Saranac Lake, and the city of Plattsburgh. The present case is one of a group presented by several complainants shortly after a general increase in rates put in effect by the Mountain Home Telephone Company, hereinafter, for reasons which will appear, treated as the single respondent. The questions presented in this case are practically determinative of those presented by the complaint of subscribers on the Chateaugay and Burke exchanges [case No. 4424] and of that presented by the St. Lawrence County Pomona Grange [case No. 4372].

The demands for relief in this particular case are so broad and so involved that it becomes necessary to make an analysis thereof and to make a brief statement of the history of the corporate transactions out of which these demands grow.

The complainants ask —

1. That the rates in Malone be reduced to the rates provided in a franchise granted to one Ward to operate a telephone system in the village of Malone;
2. A general reduction of rates to those in force before the consolidation of companies hereinafter referred to;
3. The elimination of certain toll charges between Malone and other points;
4. The "unloading" of lines upon which it is claimed too many stations are imposed;
5. The dissolution of the consolidation already mentioned, and a requirement that the Adirondack Home Telephone Company theretofore operating in the village of Malone and vicinity should revert itself of its property and restore its service;
6. A general improvement of the service rendered.

A number of years ago there was installed in Malone a telephone system by a company controlled by or affiliated with the so called Bell system which also operated in other

places in the Northern New York territory. In 1899 Fred C. Ward was granted a franchise to install and operate a telephone system in the village, and in that franchise it was contracted that he should supply telephone service at \$15 per year for business and \$12 per year for residences. Ward seems to have installed his telephone plant and operated it for some time. It was finally acquired by the Adirondack Home Telephone Company which established rates of \$24 a year for business and \$15 a year for residences, and these advanced rates were apparently accepted by the patrons. The Adirondack Home company and the so called Bell company continued to operate in competition in Malone and vicinity until February 1, 1913, when the Mountain Home Telephone Company, which had theretofore been operating in Saranac Lake and other points in Essex county, was consolidated with the Adirondack Home Telephone Company, the Clinton Telephone Company, and the New York Telephone Company (the so called Bell company), which had been operating competitively in Malone and in other places in St. Lawrence, Franklin, and Clinton counties. The Mountain Home company had purchased the physical property of the Adirondack Home Telephone Company, as it had a right to do, without the consent of this Commission. The franchise in Malone of the Adirondack Home Telephone Company was not transferred to the Mountain Home company but the franchise held by the New York Telephone Company was transferred. The transfer of this franchise was approved by this Commission by order made November 27, 1912, by which order there was also authorized the issue of certain bonds and capital stock for the purpose of acquiring the property of the other companies retiring bonds, and for other purposes. Following the consolidation the Mountain Home Telephone Company proceeded to eliminate duplicate installations throughout the territory occupied by the consolidated companies. The order of November 27, 1912, contains a condition that before making any change of existing rates the Mountain Home company should file with the

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Commission its proposed schedule of rates, which rates should not in any respect exceed the schedule of rates theretofore submitted to the Commission; and that said schedule when so filed should remain in force for a period of one year from the filing of the same. July 1, 1914, the Mountain Home Telephone Company filed a new schedule of rates, substantially increasing the rates theretofore in force. By the new tariff the following rates were installed [in addition, toll charges were provided for certain points which had previously been within the Malone free area]:

	<i>Individual line</i>	<i>2-party line</i>	<i>4-party line</i>	<i>Extension station</i>
Business	\$42.00	\$36.00	\$30.00	\$9.00
Residence	30.00	24.00	18.00	6.00

Let us then consider the complainants' demands, but not entirely in the order in which the complaint presents them.

THE RESTORATION OF THE FRANCHISE RATES.

No right can be claimed to the restoration of those rates merely because they were stipulated in the franchise granted to Ward and to which the Adirondack Home Telephone Company succeeded. As already indicated, there was nothing in the law at the time of the transfer nor is there now anything to prevent the purchase by one telephone company of the physical property of another without the consent of the Commission. The Mountain Home Telephone Company saw fit to purchase merely the physical property of the Adirondack company. It took over the franchise of the New York company with the approval of the Commission, and it is operating under the franchise of the New York company which did not contain any rate restrictions. In its present operation it is therefore not bound by the restrictions of the Ward franchise. (*Lewis v. N. Y. Telephone Company*, N. Y. Supreme Court, Oneida County, Opinion of Andrews, J., apparently unreported. See also *Wright v. Glen Telephone Company*, 112 Appellate Division 745.) It might also be added that the complainant admits that there had theretofore been a general acquiescence in an increase from the stip-

ulated rates. The demand to restore them after many years of acquiescence in higher rates would, even by a court of equity, be deemed a stale demand.

DISSOLUTION OF CONSOLIDATION AND REQUIREMENT THAT
THE ADIRONDACK HOME TELEPHONE COMPANY SHOULD
RESUME ITS PROPERTY AND FUNCTIONS.

This question arose at an early stage of the proceeding. It was presented to the Commission, and the Commission then determined that it was without jurisdiction or authority to order a dissolution of corporations already consolidated or to decree a restoration of property already legally transferred. It declined to enter upon an investigation of the facts in this connection and so informed the complainant, stating that if the complainant still desired to pursue that part of its complaint it might withdraw without prejudice the remainder thereof, whereupon the Commission would deny for want of jurisdiction the petition so far as it embraced this demand and so present the record for prompt judicial review. The complainant elected to proceed under its original complaint, and the Commission adheres to the determination then made.

THE SERVICE.

The complaint as to service was at the time it was filed entirely justified by conditions then existing. After the consolidation it required a considerable interval to unify the previously existing competing plants in Malone and other localities. As usually occurs under such competitive conditions, there had been suffered a decided depreciation of existing plant facilities. There had also occurred a sleet storm of unusual severity which had prostrated many of respondent's lines and which entailed the expenditure of much time and a large amount of money in order effectually to restore the service. In addition to this, the administrative organization of the new company had not been perfected and the general character of the service rendered left much

to be desired; in particular, certain rural and multi-party lines were greatly overloaded, with consequent delays in obtaining communication by or with the subscribers on such lines. Pending these proceedings the respondent has been apparently diligent in remedying the defects complained of. It is stated that at present no line has more than eleven stations and most of the multi-party lines have fewer. Renewals and construction work have been carried on to a reasonable extent and reforms in central office administration have been effected. At the last hearing at which evidence was taken an effort was made to show continued bad service, but it resulted in little more than could be shown in the way of particular and occasional failures in respect of any company. Examinations in Malone and at other points have been made by inspectors of the Commission who report decided improvement and present satisfactory conditions. Any defects in service remaining are not such as can be cured by specific order, but mostly depend upon the ability and desire of operating and other officials to render the service to which the company's patrons are entitled, aided as may be by inspection and recommendations of the Commission. This aid the Commission will continue to supply; and should there be ground for further complaint as to service conditions, complaints made to the Commission will receive prompt attention.

THE RATES.

1. *Basis of Inquiry*: Whatever might otherwise be the opinion of the Commission as to the burden of proof and related questions on such investigations, it has been settled by judicial decision that the burden is upon the complainant to show that the existing rates are unjust and unreasonable. (*People ex rel. N. Y. C. & H. R. R. Co. v. Public Service Commission*, 159 Appellate Division 546; affirmed 215 N. Y. 241.) Since this case arose the Legislature has changed the rule so far as it affects increases of rates made by common carriers. (*Laws 1914, chapter 240.*) Otherwise the

rule is still in effect. (*People ex rel. N. Y. Telephone Company v. Public Service Commission*, 169 Appellate Division 448.) When the complainant rested its case there was practically no evidence on the subject, certainly no evidence meeting the requirements imposed by the Appellate Division in the case last cited. However, the Court of Appeals had in the New York Central case clearly indicated the distinction between the true burden of proof and the duty of first offering evidence upon a given point, and the sitting Commissioner requested the respondent to offer evidence as to the value of its property, its revenues, and its expenses, stating however that when all the evidence was in the Commission must in weighing it place the burden where the courts had declared it must be placed, upon the complainant. The respondent accordingly proceeded with evidence upon the points indicated, and thereafter the complainants offered evidence on those subjects, to which reference will be made later. The Commission fully recognized the difficulty which complainants in rate cases meet, confronted with this rule as to the burden of proof. It is not unnatural, under the circumstances, that complainants, realizing their inability to explore the affairs of large corporations in order to make the requisite proof, should feel that the Commission should itself undertake the inquiry. If a valuation of the company's property is an essential to every rate inquiry of a general character, it is manifestly impossible for the Commission on such complaints to pursue at the expense of the State of New York the inquiry required. Existing appropriations are entirely insufficient to permit such a practice, and it is not probable that the people, speaking through the Legislature, would consent to the large burden of expense that would thereby be imposed. We must therefore take the evidence as it has been presented and determine from that whether the complainant has shown that the present rates of the respondent are unjust and unreasonable.

The path to be pursued in such an inquiry has been indicated in many cases and is recognized by statute. The com-

pany is entitled to a reasonable average return upon the value of the property actually used in the public service, and the necessity of making reservation out of income for surplus and contingencies must also be considered. The complainant desired to show that a large part of the capitalization of the Adirondack Home company did not represent money actually paid. This evidence was rejected on the ground that the question before the Commission was whether the rates yielded more than a fair return on the actual value of the property, not whether they yielded a return upon the present or past capitalization. Much of the evidence so offered was later received upon another theory and in another connection not here relevant. The capitalization authorized by this Commission November 27, 1912, was itself based on valuation and not on existing outstanding bonds and stocks of the constituent companies.

The complainant also contended that a large portion of the present property of the Mountain Home company was built up out of gifts made to the Adirondack Home company or to Ward, and out of the income of the Adirondack company. Inquiry into this was also excluded by order of the Commission made September 30, 1915, wherein the Commission held that the basis for rate making must be the value of the property used in the public service, and that it is immaterial whether that property was acquired by the issuance of capital, out of income, or otherwise. The first inquiry must therefore be as to the actual present value of the property of the respondent devoted to the public service.

2. *Valuation:* The inevitable conclusion from all the evidence in the case renders it unnecessary for us to enter into a detailed examination of the present value of the company's property or to reach any very accurate result upon that point. Prior to the consolidation, inventories were made by persons connected with the New York Telephone Company of the properties other than that of the New York Telephone Company in this territory, and an appraisal made based on such inven-

tories. The property of the New York Telephone Company in that territory was ascertained through a general inventory that had been made in 1910: the purpose being to ascertain the structural value (*i. e.* the cost of reproduction new less depreciation) of the properties about to be consolidated. In the capitalization case heretofore referred to the results of these inventories and appraisements were checked by engineers of the Commission and they were accepted by the Commission as the basis for the capitalization order. An analysis of the property of the combined corporations shows a net book value of property acquired by the Mountain Home Telephone Company at the date of the consolidation, February 1, 1913, of \$1,602,097.63. The consideration paid was \$1,589,700, leaving an excess of book value of property acquired over the consideration paid of \$12,397.63. The total fixed capital of the acquired companies was on that date \$1,473,072.49. This is the structural value of the physical property only. Deducting from this the excess of total book value over consideration paid, \$12,397.63, leaves \$1,460,674.86. The original Mountain Home company had then property to which a structural value was attached of \$46,740.25, although its actual cost as carried on the books was greater. We reach the following result:

Fixed capital acquired February 1, 1913.....	\$1,460,674.86
Structural value Mountain Home property.....	46,740.15
Total fixed capital.....	\$1,507,415.11
Additions to June 30, 1915.....	228,396.17
Total	\$1,735,811.28
Retirements in the same interval.....	248,486.43
Net June 30, 1915.....	\$1,487,324.85

The book cost as submitted by the respondent as of June 30, 1915, is \$1,508,323.85. The lower of these figures gives us the "bare bones" of the enterprise, and leads to such a result that it becomes unnecessary to consider any of the intangible or speculative elements that introduce so much difficulty into questions of valuation.

The evidence offered by the complainant to overcome this result, which is the least that can possibly be reached on the respondent's evidence, is somewhat fragmentary and far from conclusive. Probably from the very nature of the case nothing else could be expected. A former manager of the Adirondack Home Telephone Company testified as to certain unit costs. He created the impression of being a fair minded but somewhat reluctant witness. His experience had been limited to certain phases of the telephone business and he spoke from memory alone. He dealt with market prices of various materials and was able to give little information as to construction costs and other elements. The so called unit costs given by him were generally less than those contended for by the respondent but in some instances they were greater. If his testimony should be accepted entirely it would fall far short of establishing any valuation. At most it would only tend to discredit the appraisalment made on behalf of the consolidating companies and checked by the Commission's engineers.

The tax reports of the Mountain Home Telephone Company for the Malone district were also proffered. The different bases of valuation for purposes of taxation and for rate making purposes have been so uniformly recognized that it is idle to contend that these tax reports should be accepted as establishing value for present purposes. (See *Missouri Rate Cases*, 230 U. S. 474; *Willcox v. Consolidated Gas Company*, 212 U. S. 19.) It may well be that we ought to reach a condition where a single valuation of public service property could be made to answer all governmental purposes. We have not yet reached that condition. In the Consolidated Gas case referred to, the corporation resorted to the tax appraisements in order to enhance its valuation. In other cases, as in the present, the complainant parties have attempted to resort to it in order to depreciate the valuation. In no case, so far as we are informed, has the tax appraisalment been accepted as sufficient evidence of value upon which to base rates. The greatest effect that can be permitted is

that of an admission against interest, and this we can not permit to prevail against the more positive evidence corroborated by the examinations of our own engineers.

The item for right of way, \$226,732.50, as of February 1, 1913, was seriously questioned, and while it was really not impeached, the evidence to support it was far from satisfactory. If we deduct this item in toto, it still leaves, on the basis of our former calculation, \$1,260,592.35. It must not be understood that we are stating this sum as the actual value of the property employed in the public service. It is the irreducible minimum permitted by the evidence, and we use it here, not to establish it in any other connection as even an attempt at valuation, but merely as a tentative figure in connection with the revenues and expenses of the company.

3. *Revenues and Expenses*: There were proved from the books of the respondent the revenues and expenses from February 1 to December 31, 1913, for the entire year 1914, and for the six months from January 1 to June 30, 1915. Summarized these are as follows:

	<i>Feb. 1 to Dec. 31, 1913</i>	<i>Year 1914</i>	<i>Jan. 1 to June 30, 1915</i>
Total gross revenue.....	\$245,848.06	\$801,980.82	\$147,127.15
Total expenses and deductions from income	813,972.14	329,951.99	152,883.37
Expenses over revenues.....	\$68,124.08	\$27,971.17	\$5,756.22

The items of expense have been examined by the engineers of the Commission, and with perhaps one exception have been found reasonable and not disproportionate to the expenses of other similar properties. The exception referred to is the item of depreciation. Excluding this item, the expenses for 1914 were \$217,648.35, or an expense per station of \$22.21. The depreciation charge for 1914 was \$112,303.64, and the annual percentage of depreciation charged to the average plant in service from February 1, 1913, to June 30, 1915, is stated by the company to be 7.38 per cent. Again we need not enter into a detailed inquiry as to what would be a proper depreciation charge. Let us assume for the purposes of this inquiry alone, and

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without any intention of implying that the sum assumed represents a proper charge or a sufficient charge, that \$75,000 per year is ample to cover depreciation. Let us disregard the fractional part of 1913 when the condition of the respondent's business was unduly disturbed and use the figures for 1914 and the first half of 1915. We deduct then \$37,303.64 from the item of depreciation charged to expenses for 1914, and \$16,508.26 from the same item for the first half of 1915. This gives us —

	1914	1915, 1st half
Gross revenue	\$301,980.82	\$147,127.15
Total expenses and deductions	292,648.85	136,375.11

This leaves for 1914 a surplus of revenues over expenses of \$9332.47; and for the first half of 1915, \$10,752.04. This means an annual return of $\frac{3}{4}$ of 1 per cent in 1914, and at the rate of $1\frac{3}{4}$ per cent in the first half of 1915; but it must be borne in mind that interest paid is not calculated within the expenses and deductions. The interest charge is about \$52,000 per year. No argument is necessary. The inference from the above figures is conclusive. The property at the present rates falls far short of yielding a fair return upon its value.

It was contended in the hearings that the former Adirondack Home company furnished service at much lower rates and was at the same time prosperous. The greater part of the operation of this company was before 1910, when telephone companies were first subjected to the supervision of the Commission. The reports of the Adirondack Home Telephone Company for 1910, 1911, and 1912 show that no dividends were paid. They do show a certain surplus, but without going into details the showing is based upon maintenance and depreciation accounts of such character as to indicate future disaster. The net increase in the corporate surplus in 1912 was \$1446.35 on a charge for depreciation of \$6211.61, based on a fixed capital of over \$310,000.

4. *Conclusions as to Rates:* It is quite evident from what has preceded that no reduction can be ordered from the

present rates taken as a whole with any regard to a return on the property devoted to the service. Increases in rates are always disturbing and naturally productive of dissatisfaction. This is the case, entirely too common, of competing companies occupying a territory of limited patronage and fixing their rates to meet conditions of competition rather than to ensure commercial success in the long run. When rates are fixed so low as to be in the long run unremunerative, capital is not only not attracted but it can not be obtained, and the public as well as the companies ultimately suffer the consequences. The territory served by the Mountain Home Telephone Company is not thickly settled. It is largely mountainous, its winter climate is severe, and maintenance of overhead lines consequently expensive. Ogdensburg, with about seventeen thousand inhabitants, is the largest community served. Nevertheless, the rates are not higher than those prevailing in territory where conditions are more favorable, except at certain points where competition carried on in a ruinous manner may still exist.

5. *The Schedule of Rates:* The testimony of the respondent's experts is to the effect that the rate schedule is well balanced and makes a proper distribution of charges upon different branches of service. The individual line rate for business seems proportionately large. On the other hand, the principal complaint has been the increase of the four-party residence rate from \$15 to \$18. A decrease in the business rate would necessarily involve a further increase in the other. In order to render business telephones in such communities of proper service to their patrons an extended residence service is necessary. It is not improper that the business rate should bear something of a burden for this reason, even though the residence rate seems below the actual cost of the service. We are therefore not disposed to disturb the existing schedule in this respect.

The business rate for an extension station is \$9 per annum, and for residence \$6. Of late there has been a tendency toward a uniform \$6 rate. Rates as high as \$1

per month have been approved by some commissions. A rate of \$9 is quite common. In view of the manifest necessity of maintaining the total revenues of the Mountain Home company, we would not be justified in directing at present a reduction of the current rate, but as a matter of business expediency it would be well for the company to inquire whether on the whole its interest would not be better subserved by putting in a uniform \$6 rate, in the hope that an increased use of extension service would be more than compensatory.

6. *Toll Charges:* Under the old conditions of competition a large number of outlying points were able to communicate with Malone, and through Malone with one another, without the payment of tolls. This free area was certainly extended beyond all reason, as it embraced Fort Covington to the northwest, Chateaugay to the northeast, and other equally distant points. The principal complaint of the curtailment of this area and the installation of tolls comes from subscribers to the Chateaugay and Burke exchanges and is embraced in a separate complaint, but it is also involved in this complaint. Burke is about six miles from Malone and Chateaugay about nine, almost in the same line. Chateaugay has a population of 2900 and Burke 1600. July 1, 1915, there were 297 stations on the Chateaugay exchange and 74 on the Burke exchange; there were 1150 on the Malone exchange. If Burke stood alone it might well be argued that the exchange there should be abandoned and the subscribers connected directly to Malone. The small number of subscribers necessitates a central office arrangement that is not conducive to good service. The difficulty is that Chateaugay, somewhat farther away, has a much larger number of subscribers, and to handle the service through the Malone exchange would not be practicable. If separate central stations are to be maintained, the tolls between Malone and Chateaugay are defensible if not necessary. Burke could more readily be consolidated with Chateaugay than with Malone, but the people of Burke seem to desire

communication with Malone rather than with Chateaugay. Again the Commission feels that it should not, in the light of the company's financial condition, direct either a consolidation of these exchanges or an abolition of the tolls between them, but that it is a subject demanding the careful consideration of the company's officials. It may be that the desire for cheap telephone communication between these points and Malone is such that the abolition of the tolls would sufficiently increase the patronage to warrant the taking of this step. Certainly a local service such as we have in Burke, where there are only 74 stations, is not very satisfactory.

As to the other points where tolls are imposed, of which complaint is made, it is sufficient to say that they are not naturally within the Malone free area and that, while the patrons undoubtedly desire service free of tolls, the company could not afford to give it under the existing rates.

The complaint so far as it affects the rates is therefore not justified. So far as it affects the service, it was at the time it was filed justified, but improvements have been made and no specific order is now practicable which would insure further improvement. This must be left to the continuing efforts of the company and the continuing supervision of the Commission.

All concur.

In the Matter of the Petition of COLLIERS LIGHT, HEAT AND POWER COMPANY under section 68 of the Public Service Commissions Law for permission to construct poles, wires, and appurtenances for electricity in a lighting district in the town of Oneonta, Otsego county, and for approval of the exercise of rights and privileges under a franchise to use highways and public places of the lighting district received from the town board. [Case No. 5307.]

1. The Public Service Commissions Law does not give this Commission the power to determine whether or not a lighting district in a town has been established in the manner required by law.

2. The contention of a lighting corporation, doing business in one municipality, that another lighting corporation should be denied the right to exercise a franchise in an adjoining municipality in which the objecting corporation has no franchise, can not be sustained merely upon the ground that at some indefinite time it may elect to extend its lines into such adjoining municipality.

3. It is not the policy of the Commission to protect a lighting corporation in what it claims is its natural territory unless such corporation makes some effort to provide for the business therein and to give the public the service to which it may be fairly entitled.

4. If a lighting corporation sleeps on its assumed rights and fails to develop the business in a territory available to it for many years, it can not complain when another corporation engaged in the same business takes advantage of the opportunity and obtains a franchise enabling it to serve the public in such territory.

Decided February 15, 1916.

Appearances:

N. P. Willis, Esq., Cooperstown, N. Y., and *Charles Holland, Esq.*, New York city, for the applicant.

J. F. Thompson, Esq., Oneonta, N. Y., and *Howard Hendrickson, Esq.*, Albany, N. Y., for Oneonta Light and

Power Company. Mr. Thompson also appeared for the Oneonta Ice Company, a taxpayer in the proposed lighting district in the town of Oneonta.

Edward H. Bostwick, Esq., Ithaca, N. Y., for certain stockholders of the Oneonta Light and Power Company.

D. J. Killenney, Esq., Oneonta, N. Y., for the Town of Oneonta, N. Y.

Peter Van Woert, Esq., and *Fred A. Murdock, Esq.*, justices of the peace of the Town of Oneonta and members of the town board of said town.

CARR, Commissioner:

The Colliers Light, Heat and Power Company made application to this Commission on November 27, 1915, for permission to exercise a franchise granted to it by the town board of the Town of Oneonta on November 13, 1915, to enable said company to furnish electricity for lighting, heating, and power purposes in said town, and incidentally to light the streets in a certain portion of said town which has been set off as a lighting district. Notice of the application was published in the *Herald*, the *Star*, and the *Oneonta Press*, and affidavits of such publication were duly filed with the Commission. Prior to the time when the case was set down for hearing, the Oneonta Light and Power Company notified the Commission in writing that it intended to oppose this application and that it desired to be heard. The basis of the opposition was stated to be the fact that the Oneonta Light and Power Company was ready to supply light and power in the territory covered by the franchise set forth in the application, and that it objected to having permission granted to any other company to supply electricity in the newly created lighting district in that portion of the town of Oneonta adjoining the city of Oneonta because that territory would sooner or later become a part of the city in which the Oneonta Light and Power Company was supplying electricity for public and private use.

Two hearings were held in the matter, at the office of the Commission in the city of Albany: one on January 7, 1916, and the other on January 20, 1916. At that time the application was sharply opposed by the Oneonta Light and Power Company upon the grounds: first, that the portion of the town of Oneonta in which a franchise had been granted to the applicant was properly within the territory of the Oneonta Light and Power Company, and that a portion of said territory had within the past two years been converted from farms into residence property and would ultimately become a part of the city of Oneonta; second, that it was the policy of the Public Service Commission to protect an existing company within its natural territory so long as it gave proper service at reasonable rates; third, that the Oneonta Light and Power Company had sought to gain patrons in the territory in question, and had during the Summer of 1915 actually constructed its lines therein and was furnishing lights to residents in that portion of the town immediately adjacent to the city of Oneonta; fourth, that it was able to supply all of the electricity required for use in said town and at lower rates than those provided in the tentative contract made by the town board of the Town of Oneonta with the applicant; fifth, that it had received no notice of the formation of the proposed lighting district in the town of Oneonta and had not been given an opportunity to bid for the street lighting in said district, and that the Commission should not grant the application, because if this were done it would result in approving the action of the town in entering into an improvident, burdensome contract.

It was strongly contended on the first hearing that the lighting district in question had not been legally established. However this may be, it is not the province of the Commission to determine whether or not such a lighting district was properly established, as that is a matter entirely between the town authorities, the taxpayers of the town, and the applicant.

The situation in this case briefly is this: The Town of Oneonta has established a lighting district in a certain portion of the town and has entered into a contract with the applicant for some street lighting in the town. It is necessary for the applicant to have a franchise from the town authorities permitting it to construct, maintain, and operate its transmission and distribution lines in the highways of the town in order to enable it to supply such street lights and furnish electricity to the inhabitants of said lighting district. To deny the application on the grounds set forth by the opposition would be to deny to the town board of the Town of Oneonta the right to contract for lighting its streets in such a manner as might to it seem best, due regard being had to the question of whether or not there was any company supplying electricity in that portion of the town at the time the lighting district was established. It clearly appeared on the hearings that the Oneonta Light and Power Company had never obtained any franchise authorizing it to do business in the town of Oneonta. It also appeared that it was doing business in a certain portion of the town adjacent to the city of Oneonta without any legal right or authority. On such a state of facts it is not entitled to demand protection on the ground that the territory in question belongs to it because it is doing business therein in the manner stated. The fact that the town of Oneonta adjoins the city of Oneonta does not in and of itself make this the protected territory of the Oneonta Light and Power Company when it is not doing business therein lawfully and has taken no steps to obtain any rights therein prior to the time when another company comes along and obtains the necessary authority to enable it to supply electricity for lighting, heating, and power purposes in said town. It has never been the policy of the Commission to protect an existing company in its natural territory except when an earnest effort has been made to acquire the business available in said territory, nor has it been the practice of

the Commission where another company in good faith seeks to obtain permission to do business in a certain territory to prevent it from so doing because eventually this territory might be supplied by another company doing business in an adjoining municipality. Every electric light company that is progressive in its management is seeking for all available business without waiting for some other company to enter the field and thus give notice that there is business which seems to be attractive and to offer an available field for development. In this particular instance, if there is a territory which would seem to justify another company in endeavoring to obtain the business therein, it would certainly seem as though the Oneonta company, which has been doing business in the adjoining territory for many years, should at least have made some effort to develop such business before another company undertook so to do. However, the record seems to indicate that the Oneonta company was not desirous of extending its lines in the town of Oneonta, so that it can not now complain because the applicant seeks to obtain permission to exercise a franchise which has been granted to it in due course. It may properly be said that the Oneonta company was not entitled as a matter of right to any notice from the town board of the intention to establish a lighting district in said town, nor was there any obligation on the part of the town board to give the Oneonta company any notice of intention to make a contract for lighting the streets in the proposed lighting district. It may be assumed in cases such as this that the officials composing the town board of a town will do what in their judgment is best for the taxpayers of the town and not otherwise. In this case the town authorities were represented at the hearing and gave the application their support, thus indicating to the Commission that they felt that the application should be granted. If the Oneonta company had been lawfully engaged in business in that portion of the town in question, and had been diligent in

endeavoring to develop the territory, the Commission would undoubtedly have declined to grant this present application. However, such a state of affairs does not exist, and upon the facts presented there is no good reason for denying the application.

The Oneonta Ice Company, which appeared as a taxpayer in the district, has no standing before this Commission in this particular matter, because the Commission has no jurisdiction to try out actions in which taxpayers in a town allege that their town board is making improvident contracts on behalf of the town.

Certain stockholders of the Oneonta Light and Power Company also appeared by counsel, but nothing was presented to the Commission which indicated that any of their rights were being violated.

The whole proposition resolved itself down into one where an existing corporation slept on its opportunities too long and thereby enabled another company to enter a territory which should have been developed by it. No public service corporation has the right to assume that its natural territory will be kept sacred and inviolate for it alone until such time as it determines that some development should be undertaken therein regardless of the desires or requirements of the public. The wishes and needs of the people are paramount, and when a situation develops where the inhabitants of a community desire to have electricity for use in their homes and to light their streets and they are able to obtain it at satisfactory rates, the Commission should aid them in every reasonable way, having at all times of course due regard for the rights of all interested parties.

Under all the circumstances, therefore, we have determined that the application should be granted, and that the relief asked for by the Oneonta Light and Power Company must be denied.

All concur.

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In the Matter of the Petition of ALLEN P. BARTHOLOMEW under chapter 667 of the laws of 1915 for a certificate of convenience and necessity for the operation of a stage route by auto busses in the city of Geneva, it being proposed that the route shall also be operated between the city of Geneva and the incorporated village of Penn Yan, Yates county. [Case No. 5326.]

In the Matter of the Petition of JOHN J. NEIL under chapter 667 of the laws of 1915 for a certificate of convenience and necessity for the operation of a stage route by auto busses in the city of Geneva, it being proposed that the route shall also be operated in Penn Yan. [Case No. 5376.]

1. The effect of chapter 667 of the laws of 1915 was to deprive the Commission of any authority it theretofore possessed, by the issuance or withholding of certificates of public convenience and necessity, to control or regulate competition of bus lines or stage routes outside of cities among themselves or with other carriers.

2. Therefore, in passing upon an application for a certificate for the operation of a bus line or stage route from a point within a city over city streets to the city limits as a part of a line extending over country highways, the consent of the city forbidding the carrying of passengers between any two points within the city, the only question presented is whether public convenience and necessity require that the applicant, possessing already the right to bring passengers to the city limits and carry them from the city limits outward, should be permitted to bring them within the city or to pick them up within the city and carry them over the streets to the city limits.

3. Upon the facts of the cases presented certificates were granted to two applicants desiring to operate bus lines over the streets of the city of Geneva and over the same state highway to the village of Penn Yan.

Decided February 16, 1916.

Appearances:

N. D. Lapham, 435 Exchange street, Geneva, N. Y., for petitioner in Case No. 5326 and in opposition to petitioner in Case No. 5376; *Allen P. Bartholomew* in person.

E. C. Smith, Addison, N. Y., and *George I. Teter*, Geneva, N. Y., for petitioner in Case No. 5376 and in opposition to petitioner in Case No. 5326; *J. J. Neil* in person.

Harris, Havens, Beach & Matson (by D. M. Beach, F. H. Parker, and Mr. Bacon), Rochester, N. Y., for The New York Central Railroad Company, in opposition to both petitioners.

John A. Matthews, Elmira, N. Y., for The Pennsylvania Railroad Company, in opposition to both petitioners; and *H. S. Tipton*, Elmira, N. Y.

Lyster G. Bayly, Hornell, N. Y., for the State Department of Highways.

IRVINE, Commissioner:

These are separate applications for certificates of convenience and necessity for the operation of auto bus lines in the city of Geneva. The purpose of each is the operation of a line from the village of Penn Yan over the same state highway to and into the city of Geneva. Both applicants have obtained consents of the local authorities of the city, and the consent granted in each case provides that no local passengers or property shall be carried from any point within the city to any other point within the city. All question of urban competition between the two applicants or with other urban carriers is therefore eliminated. The applicant Neil has been operating his line since 1914 under a certificate of convenience and necessity granted in pursuance of section 25 of the Transportation Corporations Law as it existed prior to its amendment by chapter 667 of the laws of 1915. The applicant Bartholomew has not operated his line in the past.

By section 25 of the Transportation Corporations Law as enacted by chapter 495 of the laws of 1913 it was provided that —

Any person or any corporation who or which owns or operates a stage route or bus line wholly or partly upon and along a highway known as a state route or any road or highway constructed wholly

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or partly at the expense of the state or in, upon or along any highway, avenue or public place in any city of the first class having a population of seven hundred and fifty thousand or under, shall be deemed to be included within the meaning of the term "common carrier" as used in the public service commissions law, and shall be required to obtain a certificate of convenience and necessity for the operation of the route proposed to be operated, and shall be subject to all the provisions of the said law applicable to common carriers.

Chapter 667 of the laws of 1915 amended this section so that it now reads as follows:

Any person or any corporation who or which owns or operates a stage route, bus line or motor vehicle line or route or vehicles described in the next succeeding section of this act wholly or partly upon and along any street, avenue or public place in any city shall be deemed to be included within the meaning of the term "common carrier" as used in the public service commissions law, and shall be required to obtain a certificate of convenience and necessity for the operation of the route or vehicles proposed to be operated, and shall be subject to all the provisions of the said law applicable to common carriers.

By virtue of this amendment, the requirement of a certificate of convenience and necessity for the operation of a route upon or along state routes or roads or highways constructed wholly or partly at the expense of the State was absolutely abolished, and a certificate is now required only for routes or vehicles operating wholly or partly upon and along streets, avenues, or public places in any city. It follows that each of these applicants has an absolute right to operate his line in the village of Penn Yan and along the highway to the city line of Geneva. No certificate is required for that purpose, and the Commission has no control over such operation and no power to regulate competition between different bus lines or between bus lines and other carriers over that portion of the route. It would be a usurpation of authority, which so far as it ever existed the Legislature has taken away, for the Commission to use its power of granting or withholding a certificate to operate along city streets for the purpose of thus indirectly regulating competition over or along rural highways. It follows, therefore, that in passing

upon these cases the only question presented to the Commission is whether public convenience and necessity require that either or both of these applicants, each with the right to bring passengers to the city line and to carry passengers from the city line outward, should be permitted to bring their passengers into the center of the city or to pick up their passengers in the center of the city and carry them over the streets to the city limits.

It is therefore unnecessary and even improper to consider as a distinct proposition whether one line adequately serves or might be made adequately to serve the convenience of passengers between Penn Yan and Geneva or between intermediate points and Geneva.

The local authorities of the City of Geneva, at a public hearing at which each applicant appeared in opposition to the application of the other, granted to each its consent to operate over the city streets. The local authorities having control over ordinary street traffic and charged with the maintenance of the streets have therefore determined that the operation of the two lines is not objectionable as interfering with the proper use and maintenance of the city streets. The evidence shows that the applicant Neil has in the past enjoyed quite a large patronage. It also tends to show that the applicant Bartholomew, if permitted to operate, will probably enjoy a very considerable patronage. With the element of rural competition eliminated, it follows necessarily that each applicant should be permitted for the convenience of his patrons to bring them into the city and to take them up within the city for the purpose of carrying them over the highway after he reaches the city limits. For the foregoing reasons both certificates must be granted.

All concur.

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IN the Matter of the Complaint of the CITY OF MIDDLETOWN, by Roslyn M. Cox, Mayor, *against* ERIE RAILROAD COMPANY and the WALLKILL TRANSIT COMPANY as to the maintenance of a bridge carrying Oliver street and the electric railroad over the Erie railroad. [Case No. 5354.]

1. The procedure which a trolley company was obliged to follow in 1895 in order to take its tracks across those of a steam railroad was set forth in chapter 239 of the laws of 1893. It may fairly be assumed that the Middletown-Goshen Traction Company and the N. Y., L. E. & W. R. R. Co. entered into a written agreement covering the Oliver Avenue crossing made in Middletown in 1895 even though such an agreement can not now be found, there being no evidence that the traction company had been obliged to take the legal proceedings provided by the statute which would have been necessary had no agreement been reached.

2. This Commission is without authority to determine whether or not a street crossing the tracks of a railroad is a public highway, thereby subjecting the railroad to the obligations set forth in section 93 of the Railroad Law where such a street crosses the tracks by means of a bridge. Until such determination, the Commission can only exert its power to safeguard the traveling public upon the bridge.

3. When a public highway crosses the tracks of a steam railroad by means of an overhead bridge, it would seem that the railroad company is obligated primarily to maintain said bridge under the provisions of section 93 of the Railroad Law.

Decided February 24, 1916.

Appearances:

Abram F. Servin, Corporation Counsel, City of Middletown.

D. E. Minard, Assistant Solicitor, Erie Railroad Company.

Taylor & Royce (by Herbert P. Royce), for the Wallkill Transit Company.

CARR, Commissioner:

In December, 1915, Roslyn M. Cox, Esq., Mayor of the City of Middletown, filed with this Commission a complaint

against the Erie Railroad Company and the Wallkill Transit Company, alleging that a bridge over the tracks of the Erie railroad on Oliver avenue in the city of Middletown, over which the said Transit Company operates its cars, was in an unsafe condition, and that it is the duty of the said companies to cause the same to be repaired properly and maintained in a safe condition, under the provisions of section 93 of the Railroad Law. In due course the Erie Railroad Company filed its answer denying that Oliver avenue is or ever has been a public highway over the tracks of the company, and that no duty rested upon the corporation under section 93 of the Railroad Law to maintain and keep in repair said bridge or any portion thereof. The Transit company also filed its answer admitting the construction of the bridge over the Erie tracks in the year 1895, and that said bridge has since that time constituted a part of the public highway in the city of Middletown known as Oliver avenue; that it has at all times been willing to pay its proportion of the cost of repairing said bridge which it claims now is and has at all times been in safe condition for the operation of the cars of the Transit company. Thereafter, on January 6, 1916, the Commission issued an order to the Erie Railroad Company and the Wallkill Transit Company to show cause why they should not be required to put the bridge on Oliver avenue in proper condition.

In due course the Commission held two hearings: one at its office in the city of Albany on January 11, 1916, and the other at its New York office on January 14, 1916.

The facts are these, and they all appear in the record:

On June 29, 1893, the City of Middletown granted a franchise to the Middletown-Goshen Traction Company to build and operate a street surface railroad upon certain streets in said city. One of the lines provided for in said franchise, if it had been constructed, would have extended along Monhagen avenue to the State Hospital. On September 7, 1893, the said city also granted to said Traction

company a franchise permitting it to extend its lines upon several other streets in said city, among others "Lake Ave. from Wickham Ave. to Summit Ave. and through Summit Ave. *as now laid out and to be extended over the tracks of the New York, Lake Erie & Western Railroad Company and through the lands of Vail and Foote to Monhagen Ave.,* with such switches, turnouts, turn-tables and stands as may be necessary for the convenient constructing and operation of such road". There are no tracks at the present time on Monhagen avenue in the vicinity of the State Hospital. Apparently the operation of cars on this portion of Monhagen avenue has become unnecessary by reason of the extension of the tracks over the route covered by the franchise last above referred to. In 1895, two years after the granting of this franchise, the Traction company, which has since been succeeded by the Wallkill Transit Company, built the overhead bridge which is the subject of this complaint over the tracks of the New York, Lake Erie and Western railroad, the successor to which is the present company, which will hereafter be referred to as the Erie.

Summit avenue at that time extended from Lake avenue to the northerly right of way line of the Erie. There was no extension of Summit avenue at that time crossing the Erie tracks either at grade or by means of a bridge. A grade crossing was not practicable because the tracks of the Erie were in a cut. South of the Erie right of way and between it and Monhagen avenue were certain undeveloped lands belonging to Vail and Foote. There was no public street leading from Monhagen avenue through the Vail and Foote property, which if extended would connect with and form a continuation of Summit avenue. Vail and Foote were desirous of having their lands developed, and it was also considered advisable to extend the trolley line so as to carry passengers to the State Hospital, and an agreement was entered into between the Traction company and Vail and Foote pursuant to which the company was to extend its

lines from Lake avenue through Summit avenue and through a street to be opened on the Vail and Foote lands to a point where it would connect with Monhagen avenue. This necessitated the construction of an overhead bridge over the tracks of the Erie.

On August 29, 1895, the Common Council of the City of Middletown passed the following resolution:

That Summit avenue, commencing from Lake avenue and running southerly to the tracks of the N. Y., L. E. & W. R. R. Co., and thence by bridge over the tracks and lands of said railroad company, about to be built by the Middletown-Goshen Traction Company, and the street or highway through lands of Vail and Foote in about a direct line continuing from said bridge southerly to Monhagen avenue, be accepted as a street or highway according to the draft or plan drawn by C. H. Smith, C. E., this acceptance not to be in full force and effect until said bridge is in all respects completed, and said street through the lands of Vail and Foote properly laid out, graded and completed to the satisfaction of the committee on streets, and also released by Vail and Foote for all purposes of a street or highway.

This bridge was placed in operation and opened to public travel in the month of October, 1895, and has been used by the public and the Traction company and its successors ever since that time. The street over which the Transit company now operates from Lake avenue to Monhagen avenue and of which this bridge forms a part is known as Oliver avenue. During all of these years the Traction company has maintained the bridge, no part of the maintenance having been done by the Erie. During said period the City of Middletown has also maintained the roadway of said bridge. The claim is now made that the bridge is unsafe because of the fact that heavy automobile trucks are operating over it daily, and it has been reported to the city authorities that said bridge is not safe for such traffic. That portion which is used for carrying the cars of the Transit company is safe for that operation, so that no danger is likely to result to either the public or the Transit company from such use. Apparently the only people who are interested are those

operating the heavy automobile trucks, but incidentally the public is interested because if a truck and trolley car were on the bridge at the same time a serious accident might occur.

The Erie disclaims any responsibility for maintaining the bridge, claiming that at the time it was erected an agreement was entered into with the Traction company which placed the entire burden upon the latter named company. From the evidence in the case, such an inference might properly be made. Mr. W. B. Rockwell, who carried on the negotiations with the Erie on behalf of the Traction company, was called as a witness. He recalled the circumstances fairly well, considering the lapse of time since the bridge was built; and Mr. Mordecai, who was then chief engineer of the railroad, also recalled the circumstances. Mr. Rockwell was not entirely certain as to whether a written agreement was entered into between the two companies relating to the maintenance of the bridge, but Mr. Mordecai, who was called as a witness, was very positive that such was the case. He stated that at that time it was the practice of the engineering department of the Erie to have written agreements as to all crossings of the Erie such as the one in question, and he had no reason to believe any exception was made in the present case. Neither party was able to produce a copy of the agreement. However, there was produced an agreement entered into between the Erie and the bridge company which was to build the bridge, and which related to the work which would be done on the Erie right of way. This was on a regular printed form for use in such cases, and inasmuch as Mr. Rockwell remembered about this agreement, it is fair to assume that an agreement relating to the maintenance and operation of the bridge by the Traction company was entered into at substantially the same time.

The law relative to such crossings was considerably different in 1895 from what it is at this time. In 1890 the General Railroad Law of the State was enacted. There was no specific provision therein with regard to carrying streets

over railroads. This was taken care of by chapter 62 of the laws of 1853, which provided the method to be employed in carrying a street or highway over a steam railroad. Neither the Railroad Law above referred to nor the law of 1853 made any provision for the method to be employed in carrying the tracks of a trolley road across those of a steam road. However, this was provided for by chapter 239 of the laws of 1893. Inasmuch as the steam roads were at that time much inclined to insist upon their prerogatives with regard to the crossings made by other railroads and by municipalities, it may fairly be inferred that a distinct understanding and agreement was entered into in 1895 between the Traction company and the Erie with regard to the present Oliver Avenue bridge, because there is no evidence in this case that the Traction company was ever obliged to take the proceedings specified in the statute above referred to in order that it might carry its tracks over the tracks of the Erie railroad at the point in question. If no such agreement had been entered into, it would probably have been impossible for the Traction company to make the crossing in question without taking the legal steps set forth in the statute. Under all the circumstances, therefore, we are of the opinion that there was a distinct understanding and agreement either in writing or otherwise to the effect that the Traction company and its successors were to maintain said bridge over the tracks of the Erie after the same was built and put in operation.

This brings us to the important question of the case, and that is whether or not Oliver avenue over the tracks of the Erie is a public highway. There is no evidence in the case that the city, prior to the erection of the bridge in question, ever took the statutory proceedings necessary to open up this new street over the right of way of the Erie. One of the essential requirements in opening up such streets over the tracks of a railroad company was that the railroad company should have notice so that it might appear before the

proper authorities and be heard with regard to the matter. Such action was never taken by the City of Middletown. No reason is given why the city failed to take the necessary steps to open this street, and the courts have determined what it was necessary for a city to do in order to open up a street across the tracks of a steam railroad prior to the enactment of the so called grade crossings law in 1897. (*People ex rel. Ithaca v. D., L. & W. R. R. Co.*, 11 A. D. 280. *Miller v. New York & Erie R. R. Co.*, 21 Barbour, 513.)

Notwithstanding the fact that the procedure set forth in the law was not taken by the city, is Oliver avenue over the Erie tracks nevertheless a public highway because it has been used by the public for more than twenty years? In that connection another question arises, namely, whether or not, if such avenue is a public highway, the Erie can be subjected to the obligations set forth in section 93 of the Railroad Law with respect to the bridge even though it never consented to the opening of a public highway at this point over its tracks. The Transit company seeks to have this burden imposed on the Erie, as it would thereby relieve the Transit company of a very substantial part of the expense incident to the maintenance of the bridge. However, in view of the testimony taken on the hearings, it is doubtful whether the Transit company can successfully maintain its position. Whether or not this is a public highway at the place in question can not be determined by this Commission. It is a matter which can only be determined by the courts, and until that time the only action which can be taken by the Commission is to see that travel over the bridge is safeguarded, and this it has already undertaken to do by an order heretofore made in this case.

Another interesting point also develops in the case, namely, whether or not the city, having accepted and approved the bridge originally built by the Traction company, can now be heard to complain because the bridge is not strong enough to carry traffic which did not exist in the days when the

bridge was originally built, namely, that carried on by means of heavy automobile trucks.

Counsel for the Erie claims that section 93 of the Railroad Law does not apply to a bridge such as the one in question. If Oliver avenue, of which this bridge is a part, is a public highway, then the Erie is undoubtedly obligated primarily to maintain said bridge under the provisions of section 93 of the Railroad Law. However, it may be able to shift this burden by reason of its agreement with the Traction company at the time the bridge was originally built. Assuming that the Erie is subject to the provisions of section 93 in this particular case, then there would seem to be no question but what the Commission has the power to compel it to make the bridge safe for public travel, and if the Erie should fail so to do, it would subject itself to the penalty provided by law. However, we are not called upon at this time to decide this question, and we can not deal with it until such time as it has been determined whether that portion of Oliver avenue over the Erie is a public highway. It will therefore be impossible at this time for the Commission to give the relief prayed for, but it will continue in force its order relating to the handling of traffic over said bridge pending determination of the questions involved; and an order will be entered dismissing the complaint, with the right to the city to reopen the case at some future date if and when it is advised that the Commission can give the relief desired, and provided it shall be necessary to take such steps because of the failure of the respondents to observe the obligations resting upon them.

All concur.

In the Matter of the Petition of **ERIE RAILROAD COMPANY** for authority to issue three-year collateral gold notes to the amount of \$10,000,000; general lien bonds under its first consolidated mortgage deed dated December 10, 1895, to the amount of \$1,000,000; and convertible bonds, "Series C," under its general mortgage dated April 1, 1903, to the amount of \$7,000,000; and common stock to the amount of \$15,000,000, to be issued only for the purpose of converting said last above mentioned bonds pursuant to the terms of said general mortgage. Petition for amendment of orders. [Case No. 2845.]

By order of the Commission consolidated with

Petition of **ERIE RAILROAD COMPANY** for authority to issue \$18,000,000 in general mortgage 4 per cent fifty-year convertible bonds, and \$36,000,000 common capital stock for the conversion; also for authority to make certain modifications in the general mortgage; also for authority to increase capital stock. [Case No. 5374.]

1. A railroad corporation, with the consent of the holders of two-thirds of its capital stock, made its mortgage to secure an issue of \$50,000,000 of its 5 per cent bonds, all of such bonds to be dated April 1, 1903, to mature April 1, 1953, and after April, 1905, and before April 1, 1915, to be convertible into its common capital stock at a price not less than the market value thereof on the date of such stockholders' consent. Having issued a part of such bonds in the form authorized, the corporation proposes to issue the remainder thereof under date of October 1, 1915, due April 1, 1953, and convertible into its common capital stock at the rate of \$50 per share (which exceeds the market value of the stock both at the date of said stockholders' consent and at the present time) after April 1, 1918, and before October 1, 1927. *Held*, that inasmuch as the stockholders gave consent to the mortgage and to the issue of the convertible bonds thereunder upon the expressed understanding that the period within which such bonds might be converted should terminate April 1, 1915, the proposed extension of the convertible period to October 1, 1927, would constitute such a modification of the mortgage as to require a new consent of the stockholders.

2. Under the laws of this State no mortgage can be issued by a railroad corporation unless consented to by the owners of at least two-

thirds of the outstanding capital stock of the corporation; and the rule is the same whether such requisite consent is given in writing or by a vote at a special meeting of stockholders called for that purpose.

3. Under subdivision 10 of section 8 of the Railroad Law, when consented to by the owners of two-thirds of its capital stock and authorized by the Public Service Commission, bonds of a railroad corporation may be made convertible into its stock at a price less than the par value thereof; but such price may not be less than the market value of such stock at the time the stockholders' consent is given.

4. Circumstances under which approval of an issue of bonds by a railroad corporation, convertible into its stock at 50 per cent of the par value thereof, should be considered a proper exercise of discretion on the part of the Public Service Commission, discussed.

5. Action of minority interest declaring adjourned a meeting of stockholders after the hour fixed for the meeting but before arrival of the majority interests, which latter however were in attendance before the minority actually left the place of meeting, disapproved.

Decided March 9, 1916.

Francis Lynde Stetson, George F. Brownell, and George H. Minor for petitioners.

C. H. Venner for C. H. Venner individually, and for General Investment Company, stockholders.

VAN SANTVOORD, *Chairman*:

This is an application of the Erie Railroad Company for approval of an issue of \$28,000,000 in amount of 4 per cent bonds to be secured by its so called general mortgage, such bonds to be dated October 1, 1915, to fall due April 1, 1953: to be convertible into common stock of the corporation after April 1, 1918, and before October 1, 1927, at the rate of \$50 per share, and to be sold at 85 per cent of the face value of such bonds. As recited in the application, it is proposed to at once issue \$19,627,130 in amount of such bonds and offer the same at 85 per cent of their face value to the stockholders of the company (including what has been termed the "potential stockholders," having reference to the holders of the so called "Series B" bonds, which bonds may be converted into common stock of the company at any time before

October 1, 1917, as hereinafter explained) in proportion to their stock holdings; and subject to the approval of the stockholders and of this Commission the directors of the corporation have entered into an underwriting agreement with Messrs. J. P. Morgan and Company whereby for a compensation of 3 per centum the last mentioned firm agrees to form an underwriting syndicate which shall take over at 85 per cent of their face value all of said \$19,627,130 in amount of such bonds which shall not have been subscribed for by the stockholders of the corporation.

At a hearing before the Commission upon the aforesaid application, Mr. C. H. Venner, appearing for himself as the owner of record of one hundred shares of the common capital stock of the railroad company, and on behalf of the General Investment Company which also owns one hundred shares of said common stock, opposed the application upon the following grounds: First, that a mortgage by a railroad corporation and the issue of convertible bonds thereunder can be legally made only when consented to by the owners of two-thirds of the outstanding capital stock of the corporation; second, that bonds of a railroad corporation can not legally be made convertible into capital stock of such corporation at a rate less than the par value of such stock; third, that the proposed issue of 4 per cent bonds convertible into common stock at 50 per cent of the par value, and the present sale of upward of \$19,000,000 in amount thereof at 85 per cent, is an improper and improvident method of financing which ought not to receive the approval of this Commission.

A clear understanding of the situation in respect of the general mortgage above referred to, of the bonds already issued, and of the circumstances attending the proposed additional issue of bonds thereunder, compels a somewhat extended statement of facts in advance of any general discussion of the issues involved.

At a meeting of the board of directors of the Erie Railroad Company held on February 11, 1903, the president of the corporation explained the necessity of providing the sum of

\$50,000,000 for the uses of the corporation during the ensuing five years, and accordingly recommended the issuance of 4 per cent convertible fifty-year gold bonds in the amount mentioned, to be properly secured by mortgage on the company's property, such bonds to be dated April 1, 1903, and to be convertible into the common stock of the company at a price not less than the market value thereof at the date when the stockholders of the company should have given their consent to such bonds. (This price seems to have been officially determined at 41 per cent of par.) The directors thereupon adopted certain resolutions which provided for the execution of a so called general mortgage to secure \$50,000,000 of 4 per cent bonds to be dated April 1, 1903, due April 1, 1953, to be issued from time to time in different series and to be convertible "after April 1, 1905, and before April 1, 1915, at par, into common stock of the Erie Railroad Company, at a price not less than the market value thereof at the date when the stockholders of this company shall have given their consent to such bonds"; and that "the execution and delivery of the bonds hereby authorized and of the mortgage or deed of trust securing the same shall take place when, and not before, consent thereto shall have been given by stockholders owning at least two-thirds of the stock of the Erie Railroad Company, which consent shall be given and certified and shall be filed and recorded in the office of the Clerk or Register of the County of New York, as provided in section 2 of the Stock Corporation Law, and consent to such mortgage shall have been given also by the Board of Railroad Commissioners". [Applicant's Exhibit No. 15, March 6, 1916.]

The record also discloses that on February 11, 1903, "stockholders of the Erie Railroad Company owning in the aggregate at least two-thirds of the stock of the corporation" consented to the execution by the company of the proposed mortgage and the issuance of the proposed \$50,000,000 in amount of bonds, and further gave their "approval, consent, and authority as of this date [last above mentioned] to the resolutions of the board of directors of this date conferring

on the holder of any such convertible bonds the right at any time after April 1, 1905, and before April 1, 1915, to convert the principal of such bonds at par into the common stock of the Erie Railroad Company at a price not less than the market value thereof on this date; such bonds to be issued either in a single series or in successive series, and such price of the common stock so to be given in conversion to be not less than such market price and to be fixed from time to time by the board of directors when authorizing the issue of the several series and to be specified in every bond of the several series when and as issued, to which conversion consent hereby is given". The action of the board of directors and of the stockholders of the corporation as above recited having been duly presented to the Board of Railroad Commissioners, the latter by its order of February 18, 1903, authorized and approved the execution by the corporation of its general mortgage to the Standard Trust Company of New York, to secure \$50,000,000 of 4 per cent fifty-year convertible gold bonds, convertible into common capital stock of the corporation at such prices or rates as should thereafter and from time to time as such bonds should be issued be fixed by the directors of the corporation. The order of the Board of Railroad Commissioners also provided that the corporation might issue \$25,000,000 of such bonds without further application to said Board, but that before issuing the remaining \$25,000,000 of bonds or any part thereof the corporation should secure the approval of said Board.

Ten millions dollars of the so called "Series A" bonds secured by this general mortgage, and convertible into common stock at the rate of \$50 per share, were issued in 1903 and are still outstanding, the conversion privilege of this issue of course having expired. During the years 1905 and 1906 \$12,000,000 of the so called "Series B" bonds under this mortgage, convertible on or before October 1, 1917, into common stock at the rate of \$60 per share, were issued and are still outstanding, with the exception of \$985,000 in amount thereof which the corporation itself owns. By its

order of April 1, 1912, this Commission authorized the issuance of an additional \$7,000,000 (called "Series C") of the bonds secured by this general mortgage, which last mentioned bonds, together with \$3,000,000 in amount of the same series (constituting the remainder of the \$25,000,000 of bonds, the issue of which was as aforesaid authorized by the Board of Railroad Commissioners), by resolution of the directors of the corporation were made convertible into the common stock of the company at the rate of $66\frac{2}{3}$ per cent of the par value at any time before April 1, 1915.

In its aforesaid order of April 1, 1912, this Commission further authorized the issue of \$15,000,000 in amount of common capital stock of the corporation with which to effect the conversion of the entire \$10,000,000 of "Series C" bonds. None of these last mentioned bonds has been actually disposed of by the corporation, and with the approval of this Commission expressed in its aforesaid order of April 1, 1912, the entire \$10,000,000 of such bonds, together with other specified treasury assets of the railroad company, were pledged as collateral security for \$10,000,000 of the corporation's three-year 5 per cent collateral notes authorized in the same order, which notes were to be sold at not less than 90 per cent of par and the proceeds thereof applied in reimbursement of the company's treasury for capital expenditure made therefrom during the period December 31, 1906, to December 31, 1911. Such expenditures for capital as determined by this Commission actually amounted to \$12,021,002.73. The last mentioned order of the Commission also provided that the proceeds of sale of the \$7,000,000 of "Series C" bonds therein authorized, as well as the proceeds of sale of \$1,000,000 in amount of bonds to be issued under the company's consolidated mortgage of December 10, 1895, as also authorized in said order of the Commission, could be used only to liquidate the three-year 5 per cent collateral notes as security for the payment of which said bonds were to be hypothecated as already explained. These three-year notes matured April 1, 1915, but were extended one year.

In its present application the corporation asserts that it has been unable to sell the "Series C" bonds at prices which would be considered advantageous or which would warrant such sales, either prior to the expiration of the conversion period on April 1, 1915, or at any time thereafter. The corporation has been advised that if the rate at which said last mentioned bonds may be converted into common stock and the period of such conversion shall be changed so that such bonds may become convertible at the rate of \$50 per share between April 1, 1918, and October 1, 1927, it would materially increase their marketability. The present application is, therefore, among other things, to amend the order of this Commission of April 1, 1912, by a provision that the \$10,000,000 "Series C" bonds may be reissued under date of October 1, 1915, redesignated as "Series D" bonds, made convertible into common stock of the corporation at the rate of \$50 per share between April 1, 1918, and October 1, 1927, and sold at not less than 85 per cent of their face value. Incidentally, authority is sought for the approval of an issue of \$20,000,000 of common capital stock to be used solely for the purpose of converting said \$10,000,000 of "Series D" bonds, such issue of stock to supersede the previously authorized issue of \$15,000,000 of stock with which to meet the conversion of said bonds at the rate of \$66.66+ per share as provided in connection with the original issue thereof. Application is also made for the Commission's consent to the making of a supplementary indenture with the Guaranty Trust Company of New York as successor trustee under said general mortgage, modifying and changing said mortgage to the extent necessary and proper to bring the same in accord both with the proposed reissue of the present "Series C" bonds with changed convertible features as above described, and with the proposed issue of \$18,000,000 of additional bonds to be called "Series D" bonds (which will make up the entire \$50,000,000 of bonds provided for in said general mortgage), all of such additional "Series D" bonds to be dated October 1, 1915, and convertible into common stock of the company at

the rate of \$50 per share between April 1, 1918, and October 1, 1927, and to be sold at not less than 85 per cent of their face value; the approval by the Commission of which issue of bonds is also an object of this proceeding.

The purposes for which the proceeds of sale of all of said \$28,000,000 of bonds are to be used are as follows: (a) To pay and refund the so called three-year 5 per cent collateral notes due April 1, 1916, in the sum of \$10,000,000; (b) to reimburse the treasury of the corporation for moneys actually expended from income within five years prior to the filing of the application herein for capitalizable purposes to the amount and extent of the expenditures from the proceeds of the \$10,000,000 of three-year 5 per cent notes last mentioned, as such reimbursement was authorized and provided for in the order of the Commission of April 1, 1912, in the sum of \$9,750,000; (c) to pay and refund the company's three-year 5½ per cent notes (authorized by this Commission by its order of March 11, 1914) which fall due April 1, 1917, in the sum of \$13,280,000. Thus, if all of the avails of the \$28,000,000 bonds proposed to be issued and sold at 85 should be applied to the uses and purposes last stated, there would remain the sum of from \$9,000,000 to \$10,000,000 to be provided by the corporation from other sources in order to refund in full its aforesaid indebtedness and reimburse its treasury in the amount mentioned.

The plan of the company for financing its present and early future requirements as thus outlined, after approval by the directors, was submitted to the stockholders of the corporation at a special meeting thereof duly held on February 18th last. At such meeting, stockholders owning 1,040,590 shares of the total outstanding 1,762,713 shares of the corporation's capital stock were represented in person or by proxy, and all of the stock thus represented was voted in favor of the propositions covered by the pending applications, which had been duly submitted to the stockholders, except that C. H. Venner individually, and Charles E. Robinson as proxy for the General Investment Company, C. H. Venner,

president, voted in the negative. The special meeting of stockholders was thereupon duly adjourned to 12 o'clock noon on February 25th, at the office of the Erie Railroad Company at 50 Church street, New York city, and a transcript of the minutes of the meeting was duly certified to this Commission at its first hearing in the case on February 23, 1916. From testimony taken at a subsequent hearing before the Commission it appears that at the time and place fixed for such adjourned special meeting of stockholders, Messrs. Venner and Robinson above named attended, and there apparently being no stockholders present other than the two mentioned, the latter, after waiting until twenty minutes past the hour of noon, organized the meeting, elected C. H. Venner as chairman thereof and Charles E. Robinson as secretary; and that a motion to adjourn the said meeting for sixty days, until April 25, 1916, was thereupon put to a vote and declared carried unanimously, and said special meeting of stockholders declared to be adjourned accordingly. Shortly afterward and as it is precisely alleged, at 22 minutes of 1 o'clock p. m., and while Messrs. Venner and Robinson were still in attendance at the place stated, Messrs. Francis Lynde Stetson and George F. Brownell, two of the officers of the corporation, accompanied by its secretary, David Bosman, came into the room, and themselves proceeded to organize the adjourned special meeting of stockholders by the election of Mr. Brownell as chairman, with Mr. Bosman acting as secretary of the meeting in accordance with what appears to be the provision of the by-laws of the corporation. Mr. Stetson was the holder of proxies representing 1,040,390 shares of the stock of the company, being more than a majority thereof. A motion was made that the said meeting should forthwith adjourn to March 3rd, at the same time and place. This motion appears to have been entertained while Messrs. Venner and Robinson were still in the room; indeed, it is conceded that the acting chairman at the time inquired of Mr. Venner if he wished to vote on the motion. According to the secretary of the meeting, Mr. Venner replied that he did not care to vote;

according to Mr. Venner his reply was, "I am not participating in your alleged meeting". Thereupon Messrs. Venner and Robinson left the room, at about which time the last mentioned motion to adjourn was declared to be carried.

The by-laws of the corporation provide that "at any meeting of the stockholders, the holders of one-third of all of the shares of the capital stock of the company, present in person or represented by proxy, shall constitute a quorum of the stockholders for all purposes . . . If the holders of the amount of stock necessary to constitute a quorum shall fail to attend in person or by proxy at the time and place fixed by notice as above provided for a special meeting called by the directors, a majority in interest of the stockholders present in person or by proxy may adjourn, from time to time, without notice other than by announcement at the meeting, until holders of the amount of stock requisite to constitute a quorum shall attend. At any such adjourned meeting at which a quorum shall be present, any business may be transacted which might have been transacted at the meeting as originally notified."

It further appears in the record that on March 3rd, at the time and place last mentioned, another adjourned special meeting of stockholders of the corporation was held, at which there were present either in person or by proxy stockholders representing 1,183,858 of the 1,762,713 shares of the outstanding capital stock of the company, amounting in all to 8716 shares more than two-thirds of such capital stock. The stock owned by Messrs. Venner and Robinson was not represented at this meeting, at which the minutes of the special meeting of stockholders held on February 18, 1916, and of the adjourned special meeting of February 25, 1916, were read, and on motion, duly seconded, approved by the unanimous vote of all stockholders present in person or represented by proxy as aforesaid. By unanimous vote a resolution was also adopted to the effect that the stockholders then present did "ratify, confirm, and adopt the six resolutions and the consent adopted and given at the meeting of stock-

holders on February 18, 1916". The resolutions, etc., thus ratified and confirmed covered in their entirety the propositions theretofore approved by the directors of the company and now before this Commission for its consideration. The foregoing statement, it is believed, includes all the material facts upon which a determination in the matter should be properly based.

The first question to be considered is whether the proposed reissue of "Series C" bonds, under a new date and with a changed period of rate of conversion into stock, together with a proposed issue of "Series D" bonds to be dated and with conversion period and rate as stated, would constitute such modification of the original mortgage and of the original consent of stockholders to the issue of convertible bonds as to require a new consent of stockholders. This question we believe must plainly be answered in the affirmative. It is true that a reissue and redesignation of the "Series C" bonds changed only as to the rate of conversion thereof (provided such new rate was not less than 41 per cent of the par value of the common capital stock) would not amount to any modification of the mortgage. But the proposed change in date of the bonds, and incidentally the convertible period thereof, is quite another matter. The original consent of the stockholders to the execution of the general mortgage and the issue of convertible bonds thereunder seems to have been expressly predicated upon the fact that none of such bonds should be convertible into stock after April 1, 1915. If the proposition of the directors as originally submitted to stockholders for their approval, instead of providing that the \$50,000,000 of bonds to be issued should be dated April 1, 1903, which would require that the bond conversion period should terminate April 1, 1915 (the statutory limit of twelve years from the date of the bond), had provided that a majority of the bonds might be dated more than twelve years later, with a corresponding extension of the conversion period such as is now proposed, it is an entirely reasonable supposition that the stockholders might have withheld their con-

sent. We think that the consent of the stockholders to the making of the mortgage and the issue of convertible bonds thereunder must be considered as having been conditioned upon a termination of the conversion period of the bonds on April 1, 1915. Indeed, this fact seems to have been understood and accepted by the directors of the corporation; because in submitting their present plan to the stockholders they expressly asked consent to the making of such amendment of the general mortgage as shall be essential to a proper authorization of all of the proposed changes as to date, rate, and convertible period in the bonds now and hereafter to be issued. Manifestly these proposed changes constitute such a departure from the terms of the original mortgage and of the stockholders' consent as originally given as was not contemplated at the time. The proposed modification is, we believe, in the nature of a new contract, to legalize which requires consent of stockholders precisely as if the execution of a new mortgage were involved.

What then is required in the matter of the stockholders' consent to the execution of a mortgage and to the issue of convertible bonds thereunder by a railroad corporation? Section 2 of the so called "Stock Corporation Law" as originally enacted (chapter 688 of the laws of 1892, amending chapter 564 of the laws of 1890) in part reads as follows:

No such mortgages, except purchase-money mortgages, shall be issued without the consent of the stockholders owning at least two-thirds of the stock of the corporation, which consent shall be in writing and shall be filed and recorded in the office of the clerk or register of the county where it has its principal place of business, or shall be given by vote at a special meeting of the stockholders called for that purpose; and a certificate of the vote at such meeting, signed and sworn to by the chairman and secretary of such meeting, shall be filed and recorded as aforesaid. When authorized by such consent, the directors, under such regulations as they may adopt, may confer on the holder of any debt or obligation secured by such mortgage the right to convert the principal thereof, after two and not more than twelve years from the date of the mortgage, into stock of the corporation; and if the capital stock shall not be sufficient to meet the conversion when made, the stockholders

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shall, in the manner herein provided, authorize an increase of capital stock sufficient for that purpose.

Section 2 of the Stock Corporation Law was amended by chapter 745 of the laws of 1905, among other things, by requiring the filing in the office of the Secretary of State and of the office of the clerk of the county where the principal place of business of the corporation shall be located of a certificate under the seal of the corporation, subscribed and acknowledged by the president and secretary thereof, and setting forth among other things (1) a copy of such mortgage or resolution of directors authorizing the issue of such bonds; (2) that the holders of not less than two-thirds of the stock of the corporation duly consented to the execution of such mortgage or resolution of directors authorizing the issue of such bonds of such corporation; and (3) that if the corporation be a railroad corporation the certificate shall have indorsed thereon the approval of the Board of Railroad Commissioners, which last provision was changed so as to require approval of the Public Service Commission when the Stock Corporation Law was reenacted under chapter 61 of the laws of 1909. Except as provided in the amendments referred to, the substance of the original enactment of section 2 of the Stock Corporation Law has not been changed, and obtains today in section 6 of said law.

Under chapter 377 of the laws of 1897, subdivision 10 of section 4 of the Railroad Law was amended in other respects as follows:

But no such mortgage, except purchase money mortgages, shall be issued without either the consent of the stockholders owning at least two-thirds of the stock of the corporation, which consent shall be in writing, and shall be filed and recorded in the office of the clerk or register of the county where it has its principal place of business; or else the consent by their votes of stockholders owning at least two-thirds of the stock of the corporation which is represented and voted upon in person or by proxy at a meeting called for that purpose upon a notice stating the time, place and object of the meeting, served at least three weeks previously upon each stockholder personally, or mailed to him at his postoffice address, and also published at least once a week for three weeks successively in some newspaper printed in the city, town

or county where such corporation has its principal office; and a certificate of the vote at such meeting, signed and sworn to by the chairman and secretary of such meeting, shall be filed and recorded as aforesaid.

In the meantime it had apparently been determined by the Appellate Division that section 2 of the Stock Corporation Law applied to railroad corporations (*General Electric Co. v. Wightman*, 3 App. Div. 118); and this conclusion was reiterated by the same court in 1898 (*Flynn v. Coney Island and B. R. R. Co.*, 26 App. Div. 416). Presumably with these decisions in view it was enacted, under chapter 583 of the laws of 1899, that "section 2 of the Stock Corporation Law shall not apply to railroad corporations"; and such non-applicability of section 2 was reiterated and expressly reenacted in chapter 482 of the laws of 1900. But in 1902, subdivision 10 of section 8 of the Railroad Law (in which the provision making section 2 of the Stock Corporation Law not applicable to railroad corporations had been theretofore included) was amended by chapter 504 of the laws of that year entitled "An act to amend the Railroad Law so as to harmonize the provisions thereof with the provisions of the Stock Corporation Law concerning mortgages". Under this amendment of the act, the words "and a certificate of the vote at such meeting, signed and sworn to by the chairman and the secretary of such meeting, shall be filed and recorded as aforesaid," were changed to read "and a certificate of the vote at such meeting shall be signed and sworn to and shall be filed and recorded as provided by section 2 of the Stock Corporation Law," while the provision in regard to the non-applicability of section 2 of the Stock Corporation Law to railroad corporations was stricken out, and has never since been reenacted.

From the foregoing it would seem there can be no doubt that mortgages of a railroad corporation must be consented to by the owners of at least two-thirds of the capital stock of the corporation. But it is urged by counsel that under subdivision 10 of section 8 of the Railroad Law the consent of

stockholders owning two-thirds of the stock represented at a meeting called for this purpose is sufficient to authorize the making of such a mortgage by virtue of a decision of the Court of Appeals, which so construed an analogous provision of the statute in reference to leases by railroad corporations (*Continental Insurance Company v. N. Y. & H. R. R. Co.*, 187 N. Y. 225). We are satisfied that a careful examination of the statutes involved and of the chronology and other circumstances of their original enactment and growth and of their present form must lead to a different conclusion; and that in the foregoing brief recital of the history of the law will be found the most convincing and unanswerable evidence of the intent of the legislature as finally expressed in the reenactment in 1909 in its present form of section 2 (now section 6) of the Stock Corporation Law, and the similar reenactment in 1910 of subdivision 10 of section 8 of the Railroad Law in its present form. In the case of *Continental Insurance Company v. N. Y. & H. R. R. Co.*, above referred to, the question was as to the legality of a railroad lease which had not received the consent of the owners of two-thirds of the stock of one of the contracting corporations. This case was decided in 1907, and the essential provisions of the Railroad Law which at that time governed the making of leases by railroad corporations (section 78, now section 148, of the Railroad Law) were as follows:

Any railroad corporation within this State may contract with any other such corporation for the use of their respective roads, and if such contract shall be a lease for a longer period than one year it shall not be binding or valid unless approved by the votes of stockholders owning at least two-thirds of the stock of each corporation which is represented and voted upon in person or by proxy at a duly authorized meeting of the stockholders; and there shall be indorsed upon the contract a certificate of the secretaries of the respective corporations to the effect that the same has been approved by such votes of the stockholders.

It must be admitted that with regard alone to the precise wording of the requirement as to consent given at a stockholders' meeting there is no essential difference between the language used in the requirement of the Railroad Law as to

leases and that used in subdivision 10 of section 8 of the same law in reference to mortgages. But in view of the first clause of the provision relating to mortgages, which is not found in the provision in regard to leases, and which so plainly discloses that it is the consent of stockholders owning two-thirds of the stock of the corporation which is required; and especially in view of the final clause of the requirement as to mortgages (also absent from the requirement as to leases), that when so given, either in writing or at a meeting, such consent shall be certified precisely as required by section 6 (formerly section 2) of the Stock Corporation Law: which latter, as must be admitted, unequivocally requires certification that the "holders of no less than two-thirds of the stock have consented"; in view of all this it is impossible to hold that the decision in *Continental Insurance Co. v. N. Y. & H. R. R. Co.*, above cited, controls in this case, or that it would be regarded as controlling by the court of last resort itself if called upon to determine the question.

We are convinced that under the existing statute of this State no mortgage of its property by a railroad corporation can become effective or should be approved by this Commission unless and until consented to by the owners of two-thirds of the capital stock of the corporation.

The total number of shares of Erie Railroad Company capital stock outstanding is 1,762,713, two-thirds of which is 1,175,142; whereas the owners of only 1,040,390 shares voted in favor of the proposed modification of mortgage and issue of convertible bonds thereunder at the special meeting of stockholders on February 18th last. Said meeting was first adjourned to February 25th, and, as declared by the corporation, such adjourned special meeting was by vote of the owners of 1,040,390 shares of stock then present further adjourned to March 3rd, on which last mentioned date there were present in person or by proxy stockholders owning 1,183,858 shares of the outstanding capital stock, being 8716 shares in excess of two-thirds thereof. All of the stock thus present voted in favor of the propositions now under consid-

eration. Messrs. Venner and Robinson, however, insist that the adjourned special meeting of February 25th had been duly and lawfully adjourned to April 25th next, before the majority interests attempted to organize their aforesaid meeting, which latter was accordingly null and void. The material facts in regard to this dispute have already been recited, and we are unanimously of opinion that in their organization and conduct of the adjourned special meetings of February 25th and March 3rd respectively, as certified to this Commission, the majority interests acted within their rights, and accordingly that there is sufficient proof before the Commission that the requisite consent of the owners of two-thirds of the capital stock of the corporation has been given to the proposed mortgage and issue of bonds thereunder. Any other determination would, in our opinion, be a gross travesty upon justice, and would justly tend to bring this Commission and the very idea of public service regulation into disrepute. The by-law under which the Venner interests ventured to adjourn the meeting of February 25th was manifestly thus framed so that less than a quorum of stockholders might keep alive an initial meeting which owing to some misunderstanding, delay, or accident, would otherwise go by default to the possible serious embarrassment of the enterprise. The by-law referred to empowers less than a quorum (fixed at one-third of the stock) to adjourn a stockholders' meeting from time to time "*until holders of the amount of stock requisite to constitute a quorum shall attend*". Under an emergency such as occurred in this case, to what date ought an adjournment properly have been taken within both the spirit and letter of the by-law? Manifestly only until such time as the potential interests might be expected to attend prepared to consummate the interrupted or unfinished business for which the meeting had originally been called. But these opposing stockholders, aware of the fact that the corporation has ten millions dollars falling due April 1st next, in part to meet which this financial plan under consideration had been unanimously recommended by the directors; that

owners of more than a majority of the stock of the company had consented to the plan, but that, as these objecting stockholders had themselves urged before this Commission, the consent of owners of rather more than one hundred thousand more shares of stock was still required to make the plan effective; and that under the somewhat peculiar circumstances then existing such additional consents could be effectively manifested and certified only through the medium of the meeting called for that day [February 25th], or at the latest at a meeting to be held on some date during the ensuing two weeks: in the teeth of these facts, of which they must have been fully aware, the owners and representatives of two hundred shares of the stock of this great corporation, with its more than \$176,000,000 of stock outstanding, after waiting only twenty minutes beyond the allotted time for the belated quorum to arrive, deliberately declared the meeting adjourned for a period of *two months* — that is, to a date at least six weeks beyond the latest date at which the sole object of the meeting could be possibly accomplished! Remaining in the room, nevertheless, they were present when a few moments later a quorum of stockholders was in attendance and organized a meeting, in which, although invited to participate, the two minority stockholders declined to take any part.

What the courts might say about this as matter of technical right, if it ever should reach the courts, we of course can not know. The wise man can only surmise. Quite possibly long before the question could be considered by an authoritative tribunal the action of the owners of more than two-thirds of the capital stock will have been ratified at another adjourned meeting to be held at the same time and place as that fixed by the opposing interests at the "meeting" which they conducted on the 25th of February. But we do know that with representatives of the owners of one million shares of stock in attendance, at the place duly fixed for a meeting of stockholders, almost at the moment when the owners of only two hundred shares "announced" to them-

selves that such meeting was adjourned, and particularly while both of the participants in such action were still lingering among the ruins, to hold that they had accomplished their purpose would amount to a veritable apotheosis of technicalities, the ascription of which this Commission prefers should be assumed, if at all, by some tribunal other than itself. For us, at least, to say that the entire management of a great corporation, supported by at least \$118,000,000 in amount of its \$176,000,000 of capital stock, may be thus "put out of business," so to speak, by the owners of two hundred shares of said stock, would even in these days of battle, murder, and sudden death, be too abrupt and violent a reversal of that time honored albeit highly reprehensible commonplace that the minority has no rights which the majority is bound to respect. We accordingly hold and determine, that as far as the purposes and requirements of this Commission at least are concerned, sufficient evidence of the requisite consent of stockholders has been adduced, upon the understanding that the giving of such consents shall be duly certified and filed by the corporation as required by law.

We are thus finally led to a consideration of the question whether under all the circumstances of this case the issuance of bonds which may be converted into twice as much stock as the face value of the bonds should properly be authorized by this Commission.

It is provided in subdivision 10 of section 8 of the Railroad Law that "when authorized by the stockholders' consent to any bonds made or issued under this section, the directors under such regulations as they may adopt may confer on the holder of any such bond the right to convert the principal thereof, after two and not more than twelve years from the date of the bond, into stock of the corporation, at a price fixed by the board of directors, which may be either par or at a price not less than the market value thereof at the date of such consent to such bonds". It has been urged in this proceeding that under the statute just quoted, any conversion of bonds into stock must be at a price *not less*

than par, although in a proper case the price may be fixed at *more than par*. Such a construction, in our opinion, would both violate common sense and be contrary to the manifest intent of the statute. It is inconceivable that if the legislature had intended to prohibit conversion of bonds into stock at a rate *less than par* it would have used the language above quoted. Moreover, if intended only to authorize conversion at the par value of the stock, or in excess thereof, the provision of the statute would have been absolutely unnecessary, because without any statutory permission the corporation would be authorized to sell its stock at par and devote the proceeds to purchase of its bonds—which transaction would amount to a conversion of the bonds into stock; and similarly there would be absolutely no occasion for creating by statute the privilege of converting the bonds into stock at a higher price than par, when such conversion might unquestionably have been accomplished without statutory authority. So that the conclusion is inevitable that the sole intent of the provision in question was to authorize conversion of railroad corporate bonds into stock of the corporation at any rate whatsoever not less than the market value of the stock at the time the stockholders' consent to such conversion was given; so that what the corporation has thus far done, as well as what is now proposed in this respect, is in our opinion unquestionably legal.

When this question was under discussion at a hearing in the case, it was frankly conceded by counsel that this feature of the plan was not advanced by the corporation as an ideal method of corporate financing and perhaps ought not to be accepted under any other than compelling circumstances, which conclusion it may be observed is unreservedly shared by this Commission. In general, it must be conceded that a privilege to the purchasers of bonds to exchange the same for stock at \$50 per share is bad in principle, and may be not unfairly regarded as a device in line with those which decorated some of the most unfortunate adventures in railroad and other corporate financing in an age which, let us hope,

has in such respects passed away, forever. But after a most careful examination into the general situation of the Erie Railroad Company, of the problems which are confronting it, and of the financial necessities which attend its proper management and hoped for successful development, we have not been able to escape the conclusion that here are to be found those very compelling circumstances which justify, if the same ever can be justified, this particular feature of the financial plan under consideration. We are of course naturally, and as it seems to us properly, fortified in this conclusion by the fact that the board of directors of the company has unanimously approved the plan and certified to us that in their opinion its adoption will be for the best interests of the corporation. We are also advised that in the judgment of competent banking authorities it has not proved possible to formulate any other plan which would at once meet the necessities of the case and become measurably successful. The views of the directors have been plainly brought to the attention of the stockholders; and not only has the general plan in its every particular been approved by the owners of more than two-thirds of the outstanding stock of the company, but as far as the record discloses or the Commission has been advised, it has been formally opposed only by the owners of two hundred shares of the stock of the company, which stock seems to have been transferred to them of record as late as December 31, 1915; and informally opposed only by the owner of fifty shares of the company's stock, whose objection as set forth in a letter addressed to the Commission is that "No stock, common or preferred, should be issued unless the company has received the par value thereof, either in cash or property, or unless your Honorable Commission has given its permission to issue such stock at a less rate than the par value thereof". In view of the foregoing, it would seem that there is at least no such objection on the part of the owners of the property to what has been proposed by the directors as would indicate that the stockholders of the com-

pany are not substantially in accord with the management in respect of this plan.

It is, moreover, to be observed that with a corporate surplus of \$47,792,263.46, of which about \$7,500,000 is represented by sinking fund reserve, leaving over \$40,000,000 as the balance of profit and loss (as appears from the balance sheet of October 31, 1915, filed with this Commission): even if the entire \$28,000,000 of bonds now proposed to be issued shall be converted into stock at \$50 per share, the corporation is in position to account properly for such discount on the stock to be issued, under the classification of accounts which control in such a case. This company has assets in excess of liabilities sufficient to enable it to place 100 per cent of property back of all the \$56,000,000 of stock which must be issued, if all of the aforesaid bonds shall be presented for conversion at the rate stated. In other words, as fast as such bonds shall be actually converted into stock the discount on the transaction must properly be charged directly to the company's profit and loss account, which is at present sufficient to meet the entire burden of such discount and still maintain a surplus balance of approximately \$12,000,000.

The application should accordingly be granted and proper orders entered forthwith.

All concur.

In the Matter of the Complaint of Patrons of Freight Service of The Long Island Railroad Company in Huntington village against The Long Island Railroad Company as to discontinuance by said company of less than carload freight service by trolley railroad in Huntington village, and as to discontinuance of its freight station in Huntington village. [Case No. 5407.]

For the Commission to order a trolley line which is now losing money in its regular passenger business, to continue to carry freight at a loss, under such conditions as appear in the present case, would be to carry the principle of state regulation of street railroad corporations further than the present Public Service Commissions Law intends that it shall be carried. The fact that a steam railroad happens at some given moment to own or control a majority of the capital stock of a trolley line, as to which such a question as is here involved arises, does not of itself alter the situation, or establish any material change in the obligations under which trolley lines, by whomsoever owned, stand toward the public in respect to freight transportation.

Decided March 21, 1916.

Appearances:

J. R. Swezey, Jr., Huntington, L. I., N. Y., as attorney for complainants.

H. A. Baylis, Milton LeCluse, C. M. Felt, Brewster G. Sammis of O. S. Sammis & Company, *Alvah M. Baylis* of Huntington Lumber and Coal Company, *Henry Borchers, Herman F. Rogers*, and *George Taylor*, all of Huntington, L. I., N. Y., in person.

C. L. Addison, Pennsylvania Station, New York city, Assistant to President The Long Island Railroad Company, for respondent.

EMMET, Commissioner:

Huntington village lies some two miles to the northward of Huntington station, which is on the Wading River branch

of the Long Island railroad. The Huntington Railroad Company runs from Huntington station, through the village, to a point on Long Island Sound within the limits of the town of Huntington. Originally it was a small horse-car line, built to carry passengers, not freight. Later, the Long Island Railroad acquired control of the property and electrified it. Since then the line has been operated as an ordinary passenger-carrying street railway, although for some years past the railroad has been carrying freight and packages, in less than carload lots, from the station to the village, at a charge of two cents per hundred pounds. In handling this business the old car-barn in the village was used as a freight station, for the convenience of the local merchants. Since 1912 the trolley company's receipts from its freight business have been steadily dwindling. In September, 1915, the total freight receipts, according to company figures, amounted to but \$37.77.

The old car-barn was destroyed by fire last year, and the Long Island Railroad found it necessary to build a new freight house immediately. Conditions in and about Huntington have changed since the inauguration of freight service by the trolley, and after the destruction of the old freight building it seemed wise to the managers of the company to establish their permanent freight house in the neighborhood of the Huntington passenger station, where five years ago there had been but few houses but where a considerable development has since taken place. The continuance of service in the village meant an outlay of at least six or seven thousand dollars for new rolling stock, besides a further investment in the electrification of a short strip of new track-
age which would have to be laid. Several of the local merchants whose business had been relied upon when the service was first established, had become interested in a steamboat line running between New York and Huntington in competition with the railroad — a venture which they have very recently announced, however, that they are about to discon-

tinue. The Huntington Railroad has been steadily losing money. Taking all these matters into account, the Long Island Railroad in October, 1915, decided definitely to discontinue freight deliveries by trolley to Huntington. Before actually taking the step, however, it caused a canvass to be made for the purpose of ascertaining local sentiment on the subject. We are informed that no serious objection was then raised to the plan which the company had in mind.

Nevertheless, the present complaint (in which several of the local merchants interested in the steamboat line hereinbefore mentioned have joined) asks that an order be entered directing The Long Island Railroad Company to forthwith reestablish its freight service to Huntington village by trolley, at the old rates. We doubt the propriety of our making such an order. Notwithstanding the Long Island Railroad's ownership of a majority of the capital stock of the Huntington Railroad Company, it appears to us that we are dealing here, not primarily with a steam railroad which has well recognized obligations to the public in respect to freight transportation, but with a street railroad organized primarily as a passenger carrier, whose duties in respect to freight transportation are at least of a secondary and subordinate character. The chance circumstance that at a particular moment a trolley road happens to be owned by a steam railroad — a fact which may be changed at any time by a sale of the railroad's stock to someone else — has never so far as we know been regarded by regulatory bodies as altering materially the legal status of a trolley company thus owned, or as effecting any particular change in the obligations under which trolley lines, by whomsoever owned, stand toward the public. Such a trolley company as we are dealing with here, even though owned by a steam railroad, remains a trolley company still. It does not through the shifting ownership of its stock lose its identity and character as a street railroad and become, from the legal and regulatory point of view, a mere spur or extension of the steam railroad which happens

temporarily to control it. It is true that for some years the Long Island Railroad has made a serious effort to develop a small local freight business in connection with its Huntington trolley road, but the conditions under which the experiment was tried have changed greatly, and the venture was never a profitable one. The establishment of rival motor bus routes over the newly constructed state highway from the station to the village has relieved the trolley company of some of the responsibilities it was under when it supplied the only transportation facilities there were between these points. The establishment of the boat line to New York city had its effect, too, upon the volume of business upon which the trolley could depend. The freight equipment of the trolley line has at length become worn out and worthless, and would all have to be replaced if the service were to continue. Under all the circumstances, it does not seem unreasonable that the owners of the Huntington railroad should have given careful consideration to these matters when they were deciding whether a trolley freight service between the railroad station and Huntington village should be maintained.

It is of course a matter of regret that the experiment of carrying freight into Huntington village by trolley should have resulted as it has. That it may subsequently be found practicable to resume some sort of freight service in Huntington village is a hope which the Commission shares with the residents of that community. But there is a vast difference between expressing such a hope and actually ordering a trolley line which is now losing money in its regular passenger business to continue to engage in an enterprise with which it has no natural kinship and which experience has demonstrated to be unprofitable. Thus to dispose of this case would, it seems to us, be to push the principle of state regulation of street railroad companies far beyond what we understand was intended at the time our present Public Service Commissions Law was passed.

Unquestionably, both the Huntington trolley line and the

Long Island Railroad must from time to time perform certain services for the public at financial loss to themselves. We think there can be no doubt whatever upon that point. But the carrying of freight at a loss does not seem to us to be the kind of an obligation which should be enforced by orders of this Commission against a trolley road like the one in Huntington, in the face of proof that the road is weak financially, and that the business which it is sought to compel it to continue is very unprofitable to it. In this connection it is to be observed that when the owners of the steamboat line between Huntington and New York found *their* venture unprofitable they had no hesitation whatever in discontinuing it — without any particular regard, so far as we have been able to learn, to the effect which such discontinuance might have upon people who had been using these boats during the summer months in going between New York city and their Long Island homes. This Commission of course, has no control over the way the steamboat line shall be managed, and it does not now suggest that it should have. It is worthy of note however that the fundamental reason for abandoning service was the same in both cases. The natural arguments against such abandonment were the same also. In both cases a certain number of people were more or less seriously inconvenienced by the discontinuance of transportation. In both cases the companies were losing money. Several of the same people who showed little hesitation about discontinuing their boat line from New York to Huntington when it was found to be unprofitable are before us here as complainants against the discontinuance of the trolley service. Is it unreasonable that this Commission should take that circumstance somewhat into account in determining whether the relief asked by the complainants in the present proceeding should be granted? By their action in regard to the steamboat line they have furnished us with authentic and reliable information as to what they themselves think are reasonable grounds for a transportation company to act upon in dis-

continuing an unprofitable service, upon which a portion of the public has, nevertheless, grown to rely. The only difference between the two cases is that the boat line was a so called "independent" venture, whereas the Long Island Railroad happens at present to own a controlling interest in the stock of the trolley company. For the reasons already given, we do not think that this last mentioned fact materially affects the question as to what the Huntington Railroad, a local passenger-carrying street railway, can reasonably be expected to do in the matter of carrying freight at a loss. We feel that it would be an improper exercise of power on the part of the Commission to grant the relief which complainants have asked for in this case.

All concur.

In the Matter of the Petition of THE LONG ISLAND RAILROAD COMPANY under section 91 of the Railroad Law as to changing the Duck Pond road highway grade crossing of its railroad in the town of Oyster Bay, Nassau county, to an overhead crossing. [Case No. 1848.]

1. After determination by the Public Service Commission that properly there should be a clearance of not less than twenty-one feet between the top of the rails and the lowest point of the overhead construction of a highway bridge to be built in connection with the elimination of a railroad grade crossing, applicants applied for such a modification of the order as would permit construction of such bridge with only a sixteen-foot clearance — which application was denied. Upon a renewal of such application by the local authorities, *held* that a revocation of the order in the respect mentioned would be justified only upon proof of militating conditions which did not exist or the existence of which was overlooked at the time of the original determination or of its subsequent affirmation.

2. As a matter of general policy, from the standpoint of safety to train employees under the exigencies of railroad operation, the construction of highway bridges over railroads with a lesser clearance than twenty-one feet should not be permitted.

3. Departure from the general policy of requiring a clearance of not less than twenty-one feet in case of a highway bridge over a railroad should be allowed only under circumstances which would unanswerably justify such departure as a proper exception to the general rule.

Decided March 23, 1916.

Appearances:

George B. Stoddard for the Town Board of the Town of Oyster Bay.

James H. Cocks, Supervisor of the Town of Oyster Bay.

F. E. Willits, H. L. Batterman, E. V. Titus, E. S. Willard, J. V. C. Tappan, J. Lewis Birdsall, William H. Way, as residents and property owners, in person.

A. S. Hart for Henry A. Ingraham.

John Fitzgibbons, representing the Railroad Trainmen of the State.

J. F. Keany and C. L. Addison for The Long Island Railroad Company.

VAN SANTVOORD, Chairman:

This is an application for a modification of an order of this Commission which directs the elimination of a crossing at grade by the Duck Pond road highway of the Long Island railroad in the town of Oyster Bay, Nassau county. The order provides for an overhead highway crossing by means of a bridge, which latter shall have a clearance between the top of the rails and the lowest point of the overhead construction of twenty-one feet. The proceeding was originally instituted in 1910, and at a hearing held in December of that year the question of reducing the proposed clearance from twenty-one to sixteen feet was generally discussed. On December 20th of that year the Commission issued its order granting the petition and providing for an overgrade crossing with a twenty-one foot clearance. In January, 1911, an application for a rehearing was made by Henry A. Ingraham, representing the Barwin Realty Company, with request that the original order might be stayed until further testimony should be presented upon the question whether a clearance of less than twenty-one feet might not properly be authorized. After a hearing upon such application the Commission declined to rescind its original order, and on the 21st of March, 1912, plans for the overhead structure were finally approved. Since the last mentioned date, and until the filing of the present application, the matter had practically remained at a standstill, for the reason that the municipal authorities had not acquired the necessary land provided for in the order. The present application was originally made by residents of and owners of real property in Glen Cove, who were however advised that such a proceeding should properly be made by the town board; whereupon the latter adopted resolutions to the effect that a rehearing in the case should be applied for,

which was accordingly done. So that the matter comes formally before the Commission upon the application of the local authorities, although it is apparently the property owners of the vicinity who are mainly interested in the proposed change of plan.

After a public hearing which was held in New York city in January last, the Commissioner in charge, at the request of the interested property owners, visited the locality, and with the assistance of the Commission's engineer made a careful examination of existing conditions in the presence of the local authorities, representatives of the railroad corporation, and certain of the real estate owners.

The only question involved is whether or not as matter of policy this Commission should approve and authorize the construction of an overhead highway crossing with clearance of less than twenty-one feet. A reduction in said clearance is strenuously opposed by the railroad corporation and by the railroad trainmen of the State on the ground of safety in operation; and it is also unreservedly objected to by the engineers of this Commission. The crossing under consideration is located in the town of Oyster Bay, in Nassau county, and is on a branch line of The Long Island Railroad Company. At the last hearing it was urged on behalf of the application that between Long Island City and Hollis there are six overhead highway crossings on the line of this railroad at which the clearance is not more than sixteen feet, which latter, with possibly one or two exceptions, is stated to be the usual clearance at bridges between Oyster Bay and Long Island City; that at none of the bridges within fifteen miles of the Duck Pond road crossing is there more than a sixteen-foot clearance; and finally, that in the case of most of the overhead crossings west of Oyster Bay the clearance is only sixteen feet. All of these statements have been carefully checked by the Commissioner in charge and one of our engineers, and are proven to be either largely erroneous or properly subject to explanation. Between Long Island

City and Oyster Bay there are five bridges with a clearance of approximately twenty-one feet; of the four bridges within fifteen miles of Oyster Bay crossing, three are in the twenty-one foot class; while of the eleven bridges to the west of Oyster Bay, five are in the twenty-one foot class and six in the sixteen-foot class — of which latter, at least four and probably five are to be regarded as of a temporary nature, because under existing plans for changes in the grade of the railroad these four crossings will be changed from overhead to undergrade.

Considering Long Island City as the terminus, after leaving that point the first overhead bridge is at Collins avenue, three and one-half miles, where there is an overhead clearance of twenty-one feet. The next is at Bushwick Junction, four miles, with a clearance of sixteen feet. The next at Glendale cut-off, about six miles (where the electric division to Rockaway Beach crosses the line in question), with a temporary sixteen-foot clearance. As the Commission has been informed by the railroad company, the relative position of the two-track lines at the point last mentioned will ultimately be reversed: in other words, the electric Rockaway Beach branch will pass under the Montauk division line; so that the present facilities at this point may be considered of a temporary nature. The next overhead bridge is at Richmond Hill, seven miles, where there is a twenty-one foot clearance. At Jamaica, nine and one-half miles, there are three overhead bridges in close proximity to each other: these bridges, which carry streets in Jamaica over the railroad, all have a sixteen-foot clearance; but it is contemplated by the railroad company that in the near future its tracks at this point will be raised about twenty-five feet and that all of the streets referred to will incidentally be carried under instead of over the railroad as at present. At eighteen miles there is an overhead bridge at Mineola which has a sixteen-foot clearance, this being the last station on the main line. Following the Oyster Bay

branch, at eighteen and one-half miles there is an overhead trolley crossing with a twenty-one foot clearance. Next, at nineteen and one-half miles, is located the Motor Parkway, with a clearance of twenty-one feet; and at twenty-six and one-half miles, at Sea Cliff station, there is a foot-bridge with a clearance of about twenty feet, this being the last overhead structure on the line. The Duck Pond road crossing is at twenty-seven and one-half miles, and the terminus, Oyster Bay, thirty-two and one-half miles.

The Long Island Railroad Company is at present engaged in elevating its tracks along the main line just east of Jamaica, the bulk of the work being in the vicinity of Hollis. The next step will undoubtedly be the raising of the tracks through Jamaica, which will join the two high grades in that neighborhood and thereby eliminate the three sixteen-foot clearance bridges now standing in Jamaica. There seems no doubt that ultimately the railroad company will be compelled to elevate its tracks east of Hollis, in the course of which the existing bridge at Mineola with its sixteen-foot clearance will be automatically removed; and with this accomplished, there would remain only one bridge with a sixteen-foot clearance all the way from Long Island City to Oyster Bay — this remaining bridge being the one at Bushwick Junction, which is within the city of New York and is the crossing at Metropolitan avenue, one of the main thoroughfares in that section.

A careful examination upon the spot has convinced us that the overhead structure as planned and with the specified clearance of twenty-one feet is in all respects and under all the circumstances properly adapted to the local conditions, having all due regard to the conformation of the land, and especially to the grade of the highway on either side of the track which coördinates most admirably with a bridge structure erected so as to ensure the twenty-one foot clearance. We are accordingly of opinion that nothing has been presented by the applicants upon which properly could be

based a revocation of the original decision in this case; or a departure from the early determination by this Commission as subsequently approved and thereafter reiterated by it, that as matter of general policy the construction of highway bridges over railroads with a lesser clearance than twenty-one feet should not be permitted. This Commission and its engineers unreservedly favor a continuance of such policy, to be departed from only under circumstances which would unanswerably justify such departure as a proper exception to the general rule. In our opinion, no such circumstances exist in this case, and the application must accordingly be denied.

All concur.

In the Matter of the Complaint of the CHAMBER OF COMMERCE OF THE CITY OF NEWBURGH *against* ERIE RAILROAD COMPANY and THE NEW YORK CENTRAL RAILROAD COMPANY: refusal to make a switching charge from the West Shore Railroad to spur at West Newburgh. [Case No. 5009.]

At a point X in the city of Newburgh there is a physical connection between the tracks of the New York Central railroad and the Erie railroad. From said point X the tracks of the Erie extend westerly through Newburgh to New Windsor, a distance of 3.08 miles. At a point in said tracks just west of the Newburgh corporation line, an industrial siding having switch connection with the tracks of the Erie Railroad Company (by which such siding is operated) extends in an easterly direction back into the city of Newburgh. Along this siding, which is a mile and a-half long, there have been established various industrial enterprises, especially to serve which said siding was constructed by the Erie Railroad. No joint rates have been established on freight over the New York Central consigned to points on said siding, nor have any charges been established for switching New York Central deliveries at X from that point to destination on said siding. Under existing conditions, rail deliveries of New York Central freight consigned to a point on said siding can be obtained by the consignee only by paying to the Erie its tariff rate for hauling such freight from X to New Windsor, and a like amount for hauling it from New Windsor back to said siding and thence to point of delivery in Newburgh. *Held* that the Erie Railroad Company should establish a charge for switching New York Central cars between X and points on said siding; and that the New York Central should absorb its proper proportion of such switching charge.

Decided March 23, 1916.

Appearances:

Scott & Snead (by Charles W. U. Snead) and *Peter Cantine* for complainant.

John M. Sternhagen for The New York Central Railroad Company.

T. H. Burgess for Erie Railroad Company.

VAN SANTVOORD, *Chairman:*

This is a complaint of the Chamber of Commerce of the City of Newburgh, N. Y., against Erie Railroad Company

and The New York Central Railroad Company, alleging that the industries located along the line of the so called "Fabrikoid" siding or switch, which from its connection with the tracks of the Erie Railroad Company's main line extends from a point outside to a point inside of the city of Newburgh, are not receiving just, fair, and reasonable rates upon shipments of freight from points on the line of The New York Central Railroad Company, which points are not reached by the Erie railroad. Accordingly an order is sought directing the fixing of a joint rate schedule by the railroad corporations mentioned, or for such other relief against the alleged discrimination as may be proper.

It appears that in the year 1914, with the approval of this Commission, the siding in question was built under an agreement between the complainant, the Erie Railroad Company, and certain manufacturing interests located in the vicinity, the cost of the construction being shared in stated proportion by all the parties; and that such siding has since been and now is maintained and operated by the Erie Railroad Company. Apparently the purpose and object of the enterprise was to afford railroad facilities to the factories then located along the line of the proposed siding, and to open up for industrial development the considerable tract of land to be traversed by said siding and by such extensions thereof as might thereafter be made under the terms of said agreement. It further appears that the Erie Railroad Company operates an extension of its main line from Greycourt, N. Y., passing through New Windsor, N. Y., into the city of Newburgh, a distance of approximately nineteen miles: New Windsor being 3.08 miles distant from Newburgh, where there is a physical connection between the tracks of the Erie Railroad Company and those of the West Shore Railroad, controlled by The New York Central Railroad Company. At a short distance to the west of the corporation limits — between New Windsor and Newburgh — the said Fabrikoid siding connects with the Erie Railroad Com-

pany's main track, and extends from that point in an easterly direction back into the city of Newburgh. From the point where it leaves the main track to its easterly terminus the length of the siding is 1.519 miles. The rail distance from the Erie Railroad Company's connection in Newburgh with the West Shore railroad to the easterly termination of the Fabrikoid siding is 3.57 miles.

Under existing conditions a carload shipment arriving at Newburgh on the West Shore railroad and destined to a point on the Fabrikoid siding can be handled only by the West Shore railroad turning the car over to the Erie railroad, which latter thereupon transports it directly through Newburgh to New Windsor and from that re-ships it to the point of delivery on the Fabrikoid siding in Newburgh. The class rates applying in each direction between Newburgh and New Windsor are in cents per hundred pounds, first to sixth class respectively, 8.4, 7.4, 6.3, 5.3, 3.2, and 2.6. As an illustration, suppose a shipment of a carload of hay originating at a point on the West Shore railroad and destined to Newburgh for delivery on the Fabrikoid siding, and on which the West Shore Railroad Company's freight charge to Newburgh is \$20 against a weight of lading of 20,000 pounds: under existing conditions the West Shore would set this car to the Erie and the Erie would transport it from Newburgh to New Windsor, charging its fifth-class rate of 3.2 cents per hundred pounds, and then re-ship it from New Windsor back into Newburgh over the Fabrikoid siding for which it would charge 3.2 cents per hundred pounds, or a total rate per hundred pounds of 6.4 cents, making its total freight charge \$12.80, which combined with the freight charge of the West Shore Railroad would be \$32.80.

In answer to the complaint, the Erie Railroad Company declares that it has been and still is willing to make effective joint rates on carload traffic between industries on the Fabrikoid siding and points on the West Shore railroad

where through rates are not in effect via the Erie railroad and its connections to Newburgh, or where the West Shore Railroad Company is in a position to provide lower through rates than are in effect via the Erie railroad; but states that it is unwilling to establish a charge for switching from its connection with the West Shore to points on the siding, and alleges that requirement for the establishment of such a switching charge would result in confiscation of its property without just compensation. The New York Central Railroad Company, on the other hand, insists that establishment of the proposed joint rates from non-competitive points on its line would involve publication of the same rates on carload traffic to and from the tracks of the Erie railroad at Newburgh as in effect to and from the tracks of the West Shore railroad at Newburgh; that accordingly the Erie Railroad Company would receive a disproportionate share of such rates, which would result unfairly to the New York Central. But it declares that if there shall be established a charge for switching traffic between the West Shore terminus in Newburgh and the said siding, it will absorb a proper part of said switching charge on traffic requiring delivery or originating at points on said siding.

A careful study of the situation has led us to the conclusion that requirement of through route and joint rates is inadvisable in this case, for the following reasons: First, that if such joint rates should not be established by the carriers within the time specified in the order it would fall upon the Commission to establish the just and reasonable rates to be charged and to declare the proportion thereof which should accrue to each carrier respectively; such a determination would necessarily require a more or less extended examination and the acquisition of much information by the Commission before final action; and it does not appear from the record in the case that the situation would warrant going into the matter to such an extent. Second, the joint rate proposition would at most be beneficial only to

the carload shipper or consignee. Third, manifest difficulties in the matter of tariff publication would arise, as the measure would result in imposing upon the carriers the burden of voluminous schedule publications with numerous exceptions thereto, with the prospect of but few of the rates provided ever being used. Such shipments as that of hay and mohair referred to in the record, it may be incidentally observed, would be taken care of equally well, if not better, under a switching charge than under joint rates. Moreover, if switching charges are provided, apparently neither company would attempt to confine such charges to traffic subject to this Commission's jurisdiction; and under such circumstances the switching arrangement would in the long run be far more beneficial to shippers and consignees than would result from the establishment of joint rates.

The Erie Railroad Company's refusal to provide a switching charge to cover the service which complainant desires appears to proceed from the belief that such service calls for road haul movement rather than station switching movement; and that while the industries now located on the Fabrikoid siding and lands adjacent thereto upon which the complainant hopes to procure the establishment of other industries are within the corporate limits of the city of Newburgh, nevertheless in the movement of shipments between such points and the railroad corporation's station freight house in Newburgh, or its connection with the West Shore railroad in Newburgh, the traffic in transit would pass out of its Newburgh yard limits and out of the corporate limits of the city into the township of New Windsor. This position of the Erie Railroad does not appeal to us as logical or well taken, for the reason that said corporation has filed with the Commission a tariff as its P. S. C., 2 N. Y., No. D-68, effective January 6, 1916, naming switching charge of thirty cents per ton to apply on coal and coke in carloads, minimum weight 40,000 pounds, from its connection with the West Shore railroad in Newburgh to consignees having

private or assigned sidings located within yard limits at Newburgh. The record shows that coal which arrives at Newburgh on the West Shore is delivered to the Erie company at that point and by it hauled to delivery points on the Fabrikoid switch. The service performed by the Erie company in transporting these coal shipments is no different than would be the service performed in transporting other commodities requiring such movement.

Section 32 of the Public Service Commissions Law reads:

Sec. 32. *Unreasonable Preference.* No common carrier shall make or give any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

It is not clear, if switching charges are applicable to movement of coal, why road haul rates should apply for same movement of other commodities. There is no provision in the law which prevents the Erie company from fixing its yard limits and switching limits at stations as it may see fit. The record shows that the West Shore Railroad Company does not confine its switching limits between points on its line within the corporate limits of said city.

Under all the circumstances, we are of opinion that the situation demands the establishment of a charge for switching cars between points on the Fabrikoid siding and the Erie Railroad Company's connection with the West Shore railroad at Newburgh. While there is no evidence in the case upon the question of what would constitute a reasonable charge for such service, or what proportion of such switching charge should properly be absorbed out of its road haul revenue by the West Shore Railroad Company, in view of the fact that there has already been established in the case of coal a switching charge for the same service at the rate of thirty cents per ton for a minimum of twenty tons, equal to a six dollar per car charge, and that it would appear from

what other carriers charge for similar switching movement that six dollars per car would be a fair charge for such service, it is suggested by the Commission that the rate mentioned shall become the published rate. And in view of the fact that at numerous points the West Shore Railroad Company absorbs connecting lines' switching to the amount of five dollars per car on minimum road haul revenue of fifteen dollars per car (in quantities of 10,000 pounds or more), it would appear that an absorption of six dollars per car, minimum road haul revenue of \$17.50 per car (in quantities of 10,000 pounds or more), would be a reasonable absorption.

If therefore the parties to this proceeding shall be disposed to accept the suggestions of the Commission last above stated as to what would constitute a proper switching charge by the Erie Railroad Company for the service mentioned, and incidentally what might be considered a proper absorption by The New York Central Railroad Company, on or after the expiration of ten days from the date of service upon them respectively of a copy of this opinion and of the order which shall be entered in pursuance thereof, and not later than fifteen days after the service of such papers, the Erie Railroad Company shall publish the proposed switching charge for the services mentioned, and The New York Central Railroad Company shall similarly publish the proper absorption regulation. Otherwise, and if either of the parties hereto shall not be satisfied as to the reasonableness of what is now proposed in the respect mentioned and notice to that effect shall be filed with this Commission within the ten days' period above specified, further testimony shall be taken upon the question of a reasonable charge for the switching service to be provided for and of the amount of such switching charge which is to be absorbed by the West Shore Railroad Company out of its road haul revenue.

All concur.

In the Matter of the Joint Application of THE NEW YORK, LACKAWANNA AND WESTERN RAILWAY COMPANY and THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, under section 53 of the Public Service Commissions Law, for permission to construct at grade two side-tracks in Columbia street, one of them crossing Perry street in Buffalo; and as to said one crossing the International Railway in Perry street. [Case No. 5375.]

Although it is the settled policy of the State, as well as the City of Buffalo, where there is a local Grade Crossing Commission, to eliminate all dangerous crossings of the lines of railroads at grade with highways and streets, and prevent the construction of similar dangerous grade crossings, it is not a departure from that policy for the Public Service Commission to approve the construction of a switch track across a street in the railroad and industrial section of the city, where the same is authorized by the local authorities, is regulated and safeguarded by conditions that prevent any use of the crossing within certain prescribed hours of the morning and evening, prohibits standing cars in the street, and requires that the passage of all cars over the crossing shall be preceded by a flagman; and it is also shown that such switch is required to satisfy the convenience and necessity of the railroad and the industry to which it is extended, for both inbound and outgoing shipments of freight; and that it is probable that not more than two movements of cars across the street will be had within twenty-four hours.

The reasonable requirements of a railroad, as a common carrier, coupled with the accommodation afforded an industry in its transportation facilities, by the construction and operation of a switch track or siding, constitute the public convenience and necessity as they are defined by the Public Service Commissions Law.

The grant of the city is made "subject to the further orders of the Council of the City of Buffalo"; and it is claimed by some of the parties that this language renders the same subject to revocation at the pleasure of the municipal authorities; others maintain that the rights thus accorded the railroad company are vested and perpetual, and that the quoted clause relates only to the manner of operating the switch, the employment of safety devices and other regulative matters which may from time to time be prescribed by the city; but however this may be, the fact remains that the franchises have been duly

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granted and now exist, and the Commission is not called upon to determine the question of their duration; leaving that matter to be adjusted by the courts, in case there is any dispute between the parties; and the Commission holds that, whether they are perpetual or less, they are franchises within the meaning of section 53 of the Public Service Commissions Law.

The Commission accordingly makes an order granting permission and approval to the railroad company, pursuant to the provisions of section 53 of the Public Service Commissions Law, for the construction and operation of the switch tracks in Columbia and Perry streets in the city of Buffalo, and to exercise the franchise therefor in accordance with all the conditions and restrictions imposed by the city.

Decided March 28, 1916.

Appearances:

Rogers, Locke and Babcock (Louis L. Babcock), Buffalo, attorneys for petitioners.

Desbecker and Fisk (Louis E. Desbecker), Buffalo, attorneys for Buffalo Cold Storage Company.

Norton, Penney, Spring and Moore (James O. Moore), Buffalo, attorneys for International Railway Company.

Frederick Rupp, Assistant Corporation Counsel, and *Charles P. Babcock*, Engineer, for the City of Buffalo.

O'Brian, Goodyear and Donovan (John Lord O'Brian), Buffalo, attorneys for interested parties.

Michael F. Dirnberger, Buffalo, attorney for interested parties.

Harrington and Davidson (George C. Davidson), Buffalo, attorneys for interested parties.

Killeen, Karl and Chapin (Henry W. Killeen), Buffalo, attorneys for interested parties.

John J. Griffin, Buffalo, attorney for interested parties.

George C. Hillman and Oliver G. LaReau, Buffalo, representing the Central Council of the Citizens and Business Men's Associations.

John J. Herman, Buffalo, attorney for interested parties.

Wilcox and Van Allen (John W. Van Allen), Buffalo, attorneys for L. & I. J. White Company.

HODSON, Commissioner:

The joint application is made herein by The New York, Lackawanna and Western Railway Company, lessor, and The Delaware, Lackawanna and Western Railroad Company, lessee, for approval by this Commission of the exercise of certain franchises granted to said applicants by the Common Council of the City of Buffalo in December, 1915, and for permission to construct at grade two switch tracks or sidings in Columbia street, one of them crossing Perry street, in the city of Buffalo.

Such switch tracks or sidings are proposed to be constructed as follows, namely:

First: Beginning at a switch connection with an existing siding on the private property of the applicants, near the corner of Elk and Liberty streets, continuing over such private property to the west line of Columbia street, thence crossing Columbia street diagonally and on a curve at grade, and extending to and upon the said private property of the L. & I. J. White Company; this will be a single track and will be laid in Columbia street about sixty feet.

Second: Beginning at a switch connection with said siding No. 1 on the private property of the petitioners on the west side of Columbia street, thence curving into Columbia street and proceeding at grade along said Columbia street to and across Perry street, and thence farther along Columbia street to a direct connection with an existing siding in said Columbia street, maintained by the Lehigh Valley Railroad Company, about one hundred and fifty feet north of Perry street; this will be a single track and its length in Columbia street will be about seven hundred feet.

The franchises under consideration in this case are accompanied by several conditions, which were imposed by the Common Council of the City of Buffalo, chief among which are those which prevent the use of such switch track across Perry street between certain specified hours of the morning and evening, that no cars should be permitted by the peti-

tioners to remain standing upon Perry street at any time, nor shall any such cars be moved across Perry street unless preceded by a flagman. The proof in the case shows that the cold storage plant will probably require no more than two movements of cars across the street within twenty-four hours. The petitioners have entered into a written agreement with the International Railway Company concerning the crossing of its street railway tracks at the corner of Perry and Columbia streets. Such agreement is dated December 16, 1915, and is filed with the papers in this case; the same specifically provides for the safeguarding of said crossing as required by the grant from the city, and, among other things, further requires that all engines and cars, operating over said crossing, shall come to a full stop on reaching Perry street before crossing the same, and that the said petitioners will comply with and bear the entire expense of any future requirements of the city of Buffalo for additional flagmen, gates or other safety devices concerning such crossing.

A brief outline of the railroad situation in this section of the city will not be out of place, for it will give a better understanding of the requirements of the railroad itself, will show the transportation necessities of the industries in that locality sought to be served for both inbound and outbound going shipments of freight, and will bear upon the reasonableness of the demands of the interested parties for the construction of switch tracks in these particular streets.

The railroad of the petitioners, as is well known, is an important trunk line having its western terminus in the city of Buffalo, and extends from that city through parts of the States of New York, Pennsylvania, and New Jersey to tide-water at the city of Hoboken, in the latter State. The freight and passenger terminals of said railroad in the city of Buffalo are very extensive and occupy a large territory adjacent to the Buffalo river front in the southerly part of said city, and but recently the said companies have expended a large sum of money in the improvement and enlargement

of such terminals. The main line of said railroad terminates on the westerly side of Main street in the city of Buffalo where there are large freight docks for lake shipments. The road enters the city through the southeasterly part thereof, crossing several streets upon elevated tracks, and then for a long distance runs through Ohio street and across Mississippi, Illinois, Washington and Main streets at grade, all pursuant to authority granted by the City of Buffalo many years ago. With such main tracks there are two established switch connections and sidings which are constructed at grade over Ohio and Elk streets, and extend into private property between Illinois and Columbia streets. Ohio, Elk and Perry streets run east and west and are intersected or crossed by all the other streets above mentioned.

The block of land, bounded by Elk, Liberty, Columbia and Perry streets, belongs to the petitioners in this case, where their freight yards and freight houses are now maintained, and there are several switch tracks leading thereto from the main tracks running through Ohio street; and along the easterly side of Columbia street between Elk and Perry streets, directly across from such existing switch tracks, there are but two ownerships of real property, the one being the estate of Michael Marony on the northeast corner of Elk and Columbia streets, and the other being the large warehouse of the L. & I. J. White Company, manufacturers of edge tools and machine knives, and which alone occupies more than two-thirds of said street frontage.

Perry street extends from Main street to and beyond Michigan street, where is located the Elk Street market, so called, and Michigan is the first street east of Columbia street and running parallel thereto. Between Main and Michigan streets, there are at present no steam railroad tracks or crossings on Perry street, which is one of the principal thoroughfares leading from Main street and the west side of Buffalo to said market; but just east of said market and running north and south across Fulton, Perry and Scott

streets are the tracks of The New York Central Railroad Company leading from the main line of said railroad to its freight house and docks on the Buffalo river, which are very extensive, being about half a mile long; that the number of said tracks crossing Fulton street at grade are eight, crossing Perry street at grade are nine, and crossing Scott street at grade are five, which latter include a switch track across said street to the Hoefeler Warehouse. The International Railway Company now maintains and operates double tracks on Perry street from Main to Michigan and thence turns to the south on Michigan street to Elk street and goes on to South Buffalo. The main line of the Lehigh Valley railroad runs just north of the Buffalo cold storage plant, contiguous to and some part of which is within Scott street, and adjoining the Lehigh Valley railroad on the north is the abandoned Hamburg canal, which is now owned by the railroads, and just north of the canal are the New York Central yards and station, which are very extensive, and all of its tracks continue to the east under the Michigan street viaduct where the yard and tracks of the Erie railroad are joined, and together such railroad tracks continue easterly and broaden by including the Lake Shore and Pennsylvania railroad tracks. In this same territory are located many of the factories and industries of Buffalo, most of them having switch and plant facilities from one or more of such railroads. Thus it will be seen that this locality is given over to railroad operation and industrial plants, and it is known as the railroad section of the city of Buffalo.

The cold storage plant lies between the Lehigh Valley and Lackawanna railroads, the main tracks of which are, respectively, one block away, although the distance to the Lackawanna tracks is considerably greater than to the Lehigh Valley tracks; it now has no direct railroad facilities, except a Lehigh switch, which conveniently reaches the plant through Columbia street and ends on the northerly side of Perry street; there are at present no switch tracks or sidings

in Columbia street south of Perry street, and, therefore, the White factory has no direct rail freight facilities; and both these establishments, which receive by rail large quantities of commodities, and in like manner ship out their products, are now required to handle the same by private hauling, except in the case of the storage company employing the aid of such Lehigh switch; and this is so, even though they are surrounded by railroads, and the yard tracks of the Lackawanna are just across the street from both plants. These two proposed switch tracks are to be connected with such yard tracks, and run across Columbia street, one to the White Company's factory and the other to the cold storage; Columbia street at the point of such crossing has very little traffic other than trucking of freight, and, as previously pointed out, the entire block frontage is owned by the petitioners on the one side, and by the White Company and the Marony estate on the other; so that there can be no valid objection to the approval of the franchises for the construction and operation of the switch tracks in Columbia street south of Perry street. On the merits, therefore, the only remaining question to be considered is the propriety of continuing one of such switch tracks across Perry street and the International Railway Company's tracks, in order to conveniently serve the cold storage, and this branch of the application will now be discussed.

The character of the business conducted by the cold storage company is indicated by its name, and it will require no argument to establish the proposition that the best treatment of food products, while in storage, will generally be of no benefit to the tradesman or consumer, if there is neglect or delay in the shipments of the same, either going in or coming out of storage; the witnesses in this case agree that the practice of trucking, with the necessity of transferring freight to the cars, involves such exposure and delay which might cause serious damage to such produce, and in cases where reliance was had upon the interchange by way of the

Lehigh Valley switch to other railroads it was proven that such operation often consumed twenty-four hours, and it is perfectly obvious that the transportation of food products for the market, such as poultry, vegetables and fruit, should be as free from handling, transshipment and delays as may be reasonably provided.

The original franchises herein were granted by the passage of a resolution by the Board of Aldermen of the City of Buffalo on the 27th day of December, 1915; such action was concurred in by the Board of Councilmen on the 29th day of December, 1915, and the same was approved by the Mayor of the city December 30, 1915. On the 1st day of January, 1916, a Commission form of government, consisting of a mayor and four councilmen, succeeded the former government of the city. January 11, 1916, the petition herein was filed with the Commission, upon which a hearing was held on the 21st day of January, 1916, and thereafter several hearings were had in this case. At the hearing held by the Commission on the 5th day of February, 1916, a notice was given by those who objected to the approval of said franchises that an application would be made to the present Council of said city for the revocation of such franchises, and an adjournment was accordingly granted until such application could be made and determined. On the 1st day of March, 1916, a resolution was unanimously adopted by the Council of the City of Buffalo, composed of the Mayor and four Councilmen, which denied the application for the revocation of such franchises, and the hearing in this case was resumed on the 10th day of March, and the evidence was closed March 11, 1916. The contestants in this case urge several objections to the approval of such franchises, all of which are entitled to the careful consideration of the Commission.

It is claimed that the State of New York, and the municipality of Buffalo as well, are committed to the policy of eliminating dangerous railroad crossings at grade, and preventing like construction in the future. This is true, and it

is a matter of public knowledge that the State, the railroad companies and many of the municipalities of the State have expended vast sums of money in order to make such crossings safe; but it must be borne in mind that no such grade crossing has yet been the subject of elimination where only switch tracks were involved; and it has been the uniform policy of this Commission to give its approval to the acts of municipal authorities in cases of this kind, where it distinctly appears, as in this case, that such switch facilities are not only necessary to enable the railroad to perform its functions and obligations as a common carrier, but are also essential to meet the reasonable requirements of the shippers and patrons of the road, for in no other way could the business of the city be properly handled or adequately developed.

The City of Buffalo has an independent Grade Crossing Commission, which is charged with the duty of bringing about public safety at certain existing grade crossings within a limited territory, which includes the streets in question. There is also a Terminal Commission for the city, which is authorized to negotiate with the railroads for improved freight and passenger terminals. These commissions include in their memberships many of the leading business and professional men of Buffalo, and yet at none of the hearings in this case was there any appearance noted or objection made herein by or on behalf of either of those commissions or any member thereof. At certain stages of the proceedings there were very strenuous objections made by those who afterward appeared before the Commission and withdrew such objections. The president of the Retail Grocers Association, whose members make daily trips over Perry street to and from the market, was sworn as a witness and his testimony was calculated to prove that the crossing of Perry street with this switch track would seriously interfere with the traffic over Perry street; but near the close of his evidence he made the statement that if the operation of the cars over the switch track to the cold storage plant should be limited to two ser-

vices in twenty-four hours, he did not believe that such use would interfere with the traffic on Perry street. Again, at the hearing held by the Commission on February 5th, a prominent member of the Produce Exchange, which is composed of about forty of the leading produce dealers on said market, most of whom are frequent users of said cold storage facilities for their commodities, testified very strongly against the construction of said switch track across Perry street, but at a subsequent hearing, on the 11th day of March, 1916, a letter, dated March 6, 1916, was presented from this witness, who stated therein that since he had testified in this matter he had investigated the same more thoroughly and not only withdrew his opposition but stated that he was very much in favor of affirmative action by the Commission. At the last mentioned hearing, the president of the Produce Exchange appeared and voiced the approval of such organization to the switch track running across Perry street, notwithstanding the fact that the Produce Exchange appeared by counsel at a previous hearing herein and opposed the approval of said franchises.

Here, then, is the official action of the City of Buffalo taken under one form of government and ratified by the new Commission government; such action followed the request of the railroad company for the privilege of constructing such switch tracks in order to serve its patrons and shippers and properly perform its obligations as a common carrier. The construction and operation of such switches will, of course, satisfy the convenience and be of great benefit to the Buffalo Cold Storage Company and the L. & I. J. White Company, in the receipt of incoming freight and the convenient transportation of shipments from their respective plants, but the public will necessarily share in the benefits which flow from such improved transportation; and we are of the opinion that the reasonable requirements of the railroad, as a common carrier, coupled with the accommodation thus afforded the various industries in their transportation facilities, con-

stitute the public convenience and necessity as they are defined by the Public Service Commissions Law.

The Corporation Counsel of the city contends that the franchises in question are revocable, at the pleasure of the Council, in accordance with the language "subject to the further orders of the Council of the City of Buffalo," which is contained in the resolution granting such franchises; while the counsel for the petitioners claim that such franchises are perpetual, and that the language just quoted relates only to the manner of operation, the employment of safety devices and other regulative matters which may from time to time be prescribed by the city. But, however this may be, the fact remains that the franchises have been granted and now exist, and this Commission is not called upon to determine the question of their duration. True, if the present Councilmen of the City of Buffalo had exercised the power of revocation of such franchises, as they were requested to do, and this case was continued upon the petition herein, which asks for the approval of the franchises as originally granted, it would then be incumbent upon the Commission to decide the question as to whether or not such franchises actually exist. But there is no such question before the Commission at this time; and if in the future there is any dispute between the parties as to the character and duration of these franchises, the same must be adjusted by the courts.

After a very careful examination of the record in this case, we are satisfied that the crossing of Perry street with the switch track running to the Buffalo cold storage plant will not seriously interfere with the traffic of said street nor render such crossing dangerous, because the conditions and limitations imposed upon the petitioners with reference to the operation of its cars over such crossing will make the same safe for the traveling public; and if the future should develop the necessity for additional safeguards, the local authorities and this Commission have ample power to make

such further directions as the circumstances may require. Having thus passed upon the matter of crossing Perry street with this switch track, we are also satisfied that public convenience and necessity require the construction and operation of both such switch tracks in the manner and to the extent above mentioned, and an order should be entered authorizing the same, together with the exercise of the franchises therefor.

All concur.

In the Matter of the Petition of the SOUTH SHORE GAS COMPANY under section 68 of the Public Service Commissions Law for approval of a gas franchise from the Town of Islip, and for permission to construct thereunder; and also for approval under section 70 of the Public Service Commissions Law of a proposed lease of said franchise by the petitioner to the Suffolk Gas and Electric Light Company. [Case No. 3829.]

The Commission's approval of a gas franchise which upon its face is regular and which appears to have been lawfully granted by the local authorities — and the Commission's permission to construct under such franchise and to lease same — should not be withheld merely because a private individual expresses, at the hearing on the application, his personal belief that the franchise was fraudulently made and procured, but presents no evidence to substantiate this suspicion.

Decided April 6, 1916.

Appearances:

Henry R. Frost, Esq., Attorney, and *E. L. Phillips, Esq.*, Treasurer, 50 Church street, New York city, for South Shore Gas Company.

Ralph K. Jacobs, 215 Montague street, Brooklyn, N. Y., as Attorney for Marvin Sheibler, Esq., 30 Church street, New York city, who also appeared in person, in opposition.

Peter E. Nostrand, Esq., Shelter Island Height, N. Y., County Superintendent of Highways, Suffolk County.

B. H. Wait, Esq., Division Engineer, State Commission of Highways.

By the Commission:

We have given very careful consideration to Mr. Sheibler's objections to this application, and to the views of the present Town Board of Islip, but upon the evidence before us we are unable to do otherwise than grant the petitioners the relief asked for. The franchise given by the Town of Islip

to the South Shore Gas Company is regular upon its face. Mr. Sheibler believes that it was improperly procured, but nothing before us would warrant our acting on that assumption now. The proposal to transfer this franchise to the Suffolk Gas and Electric Light Company seems to be a perfectly proper and businesslike one. Mr. Sheibler asserts that no new construction work will be done under this franchise; that the lessee company has already laid mains throughout Islip under franchises which Mr. Sheibler believes are invalid. That may be so, but even if it is — even if the motive of the Suffolk company in acquiring the present franchise is, as Mr. Sheibler thinks, simply to validate doubtful franchises under which it is now operating — we can not see that we should refuse our consent to the leasing of the franchise which was granted to the South Shore Gas Company. There is no proof before us that the old franchises of the Suffolk Gas and Electric Light Company were dishonestly acquired any more than there is that the franchise in question is bad for a similar reason. On its face, the entire transaction to which we are asked to give our consent seems regular and legitimate. Mr. Sheibler may believe, as the result of his personal inquiries and his estimate of the character of the men composing the town board which granted the franchise, as well as of those who now seek to operate under the franchise, that something is rotten in Denmark; but it would be quite unheard of for any responsible governmental body to accept such conjectures as a basis for official action without pretty convincing evidence that the conjectures are well founded. If the franchises of the Suffolk Gas and Electric Light Company are tainted with fraud, as Mr. Sheibler believes, they can doubtless upon proper evidence and in a proper proceeding be upset; but the record in the present case furnishes no ground whatsoever for our acting upon the assumption that such is the case, or for our refusing to make such an order as is now asked for by the petitioner.

In the Matter of the Complaint of EDWARD F. MURRAY, President Merchants' Line (a boat freight line operating from Troy), *against* THE DELAWARE AND HUDSON COMPANY, protesting against certain tariffs and supplements (in connection with the Merchants' Line) filed by The Delaware and Hudson Company changing transfer point from Green Island to Albany. [Case No. 5358.]

A boat line handling freight from and to points on the Hudson River is not one of the common carriers entitled to relief at the hands of the Commission under the provisions of section 35 of the Public Service Commissions Law.

The law of regulation as now administered does not contemplate that one carrier regardless of its own interests as well as those of the public should be obliged to so conduct its operations as to best accommodate the business of a competing carrier.

When a railroad corporation proposes to re-locate a transfer terminal where it interchanges freight with boat lines, and it appears that the interests of the public will not be unduly prejudiced by such change, the Commission should not attempt to prevent such action even though it had authority so to do. *Murray's Line v. The Delaware and Hudson Co.*, II P. S. C. 2nd D. Reports 127, followed.

Decided April 6, 1916.

Appearances:

Edward F. Murray for the complainant.

Edward G. Murray representing the Edward G. Murray Lighterage and Transportation Co.

Frank H. Deal for the Village of Green Island.

L. D. C. Woodward for the Chamber of Commerce of Watervliet.

Lewis E. Carr and *John E. MacLean* for The Delaware and Hudson Company.

By the Commission:

This is a complaint made by Edward F. Murray as President of the Merchants' Line, Inc., against the proposed

discontinuance by The Delaware and Hudson Company of the freight transfer facilities at the Green Island dock in the village of Green Island, N. Y., of which the railroad company has given notice by the filing of certain tariffs and tariff supplements to become effective January 1, 1916. The complaint alleges that the evident purpose of said tariffs and supplements is to discontinue the freight transfer at the Green Island dock, and to force the transfer of all freight between The Delaware and Hudson Company and the boat lines to be made at Albany which would be very expensive and inconvenient for the Merchants' Line, Inc., and its patrons and would cause unnecessary delay to property. At substantially the same time as this complaint was filed, another complaint was filed by the Edward G. Murray Lighterage and Transportation Company protesting against the discontinuance of the terminal at Green Island for the transfer of freight from boats to cars and *vice versa*.

In due course the railroad company answered the complaint, alleging that prior to making joint rates with the Merchants' Line, Inc., its president, Mr. Murray, was advised that The Delaware and Hudson Company proposed to discontinue the transfer of freight between the boat lines and The Delaware and Hudson Company at Green Island, and explained the reasons therefor. Notwithstanding this the complainant desired to have the joint rates established, and this was done. The answer further states that one of the reasons for discontinuing this Green Island transfer is the expense involved in dredging the channel to reach the dock and for making repairs to the dock. It also states that approximately 85 per cent of the traffic with the boat lines is interchanged at Albany and only about 15 per cent at Troy or Green Island, and that there are ample facilities to handle the business at Albany, and it is an unnecessary expense to operate two transfer points so near together.

The Commission held two hearings in this matter, one on January 26, 1916, and the other on March 1, 1916.

The terminal at Green Island where the transfer of freight has been made between the boats and cars has existed for more than fifty years. The Merchants' Line, Inc., has been in existence about eight years, and until 1915 it carried only coarse freight such as marble, slate, paper, and other commodities of that character. The freight which the complainant carries down the river is mostly marble, slate, paper, and freight of that character; and the freight which it brings up the river is clay, rosin, brimstone, and commodities of that sort. The practice of the complainant is to load the lighter freight on top of the heavier freight, the heavier freight being loaded on the decks of the complainant's boats at the Green Island transfer, after which the boats go to Troy where they obtain the lighter freight, and then proceed down the river. The complainant rarely ever receives a full boat-load from any one consignor. The expense of transferring the freight between the boats and the cars is borne by the complainant. The complainant loads little or no freight in the holds of the boats because this makes the handling too expensive. It is convenient and inexpensive now for the complainant to take its boats back and forth between Green Island and Troy for the purpose of loading freight, as Green Island is just across the river from Troy. The transfer terminal at Albany is about eight miles south of the present dock at Green Island, so that if the complainant should pursue its present practice with regard to the loading of freight it would be obliged to take its boats to Albany to obtain the heavier freight there and then proceed north to Troy to obtain the lighter freight, and this would of course increase the expense by reason of the time occupied in going back and forth between the two cities. Some of the freight which the complainant loads at Troy originates there, and some of it is brought from Green Island and Watervliet by trucks, and The Delaware and Hudson Company does not participate in that movement. The railroad company does not intend to change the present

division of through rates between the parties to this proceeding which now applies to this service in the event that the proposed plan of transferring freight at Albany instead of Green Island is carried into effect.

The Village of Green Island objects to the proposed arrangement for transferring freight at Albany instead of Green Island on the assumption that the charges to shippers at Green Island will be increased. It clearly appears in the record that the through rates to shippers at Green Island will not be increased by having the transfer made at Albany so it would seem that no hardship will be imposed upon them. It probably may be assumed that it is immaterial to them whether the freight is transferred at Green Island or Albany so long as their freight rates remain the same.

In August, 1915, when the Merchants' Line, Inc., began to carry merchandise, it requested The Delaware and Hudson Company to establish joint through rates, and this was done. The evidence shows that the dock at Green Island is in a bad state of repair and that a considerable amount of money would be required to put it in proper condition. There is no dispute between the parties but what at the time these joint rates were put into effect Mr. Murray was advised by the representatives of the railroad company that it was proposed to abandon the Green Island dock in the near future, and that when this was done the transfer of freight between boats and cars would be made at Albany [Minutes, p. 4]. There was no objection on the part of the complainant, because it expected to handle its freight at the barge canal terminal in Troy eventually which would be just as convenient for it as Green Island. In October, 1915, the railroad company notified the complainant that the transfer of freight at Green Island would be discontinued January 1, 1916; and thereafter, when the necessary tariff supplements and tariffs were filed to accomplish this purpose, such action

on the part of the railroad company was followed by the formal complaint which is now before the Commission.

Some of the matters which are pertinent to this case were determined by this Commission some years ago, at the time the so called Murray's Line brought a proceeding before this Commission to compel The Delaware and Hudson Company to make joint rates with it. This case is reported in II P. S. C. 2nd D. Reports, 127. At that time it was determined by the Commission that it had no jurisdiction over boat lines handling freight from and to points on the Hudson river, such a carrier not being one of those covered by the Public Service Commissions Law, and that it therefore could not require through rates to be established by the parties. This decision as to the jurisdiction of the Commission over boat lines applies with equal force to the complainant in the present case. There is no question of rates involved in this proceeding. This matter is not one where shippers are complaining of the failure of the respondent to provide proper facilities, or that it is subjecting them to any unreasonable prejudice or disadvantage in any respect whatsoever within the contemplation of section 32 of the Public Service Commissions Law; the complainant has not contended that there is any discrimination against it such as is prohibited by section 35 of the Public Service Commissions Law; and even if such contention were made, it could not be sustained because it is not one of the common carriers within the meaning of the law which is entitled to relief at the hands of the Commission pursuant to the provisions of that section. The judgment of the Commission is not invoked with regard to the question of the facilities at the Green Island dock with respect to whether or not the same are adequate and reasonable for the handling of freight as it might perhaps be if the public were not being properly served at this point. The real and practically only contention which is made by the complainant, and the reason why he asks the Commission to require the continuation of the transfer facilities at the

Green Island dock, is set forth concisely in the record at p. 110, as follows:

Why, that is the contention right here, Mr. Commissioner, that we object to going to Albany. While our customers may have the same rates, it will be a source of very great additional expense to us if we are obliged to send our boats to Albany to receive and deliver the railroad freight there and then come back to Troy to load or unload the merchandise. That is the contention we have. We can not afford it. It means an expense of about \$22 additional on each boat, besides the time.

and again at pp. 115 and 116, as follows:

If there was no terminal or transfer facilities at Green Island, and there was 660 carloads of freight offered that could be more conveniently handled there than at another terminal, I believe it would be the duty of the Commission to order the installation of a terminal with proper handling facilities to take care of that business. Now that is the fundamental principle of our case, that if their own testimony showed that there was 660 odd cars of freight handled there, I believe it is the power and duty of the Commission to compel them to put a terminal with proper facilities there.

The question then for the determination of this Commission in this present matter is whether or not it can restrain a railroad company from discontinuing the transfer of freight between boats and cars at a specific point when it desires so to do, and to conduct this business at another point on the river where ample facilities are provided therefor and where it appears that there will be no increased expense or inconvenience caused to shippers by the change in the existing practice. There is certainly no provision in the law conferring jurisdiction on this Commission which would seem to prevent this action on the part of the railroad company, provided it has determined to do this for the better accommodation of the public as well as the more convenient handling of its business and also to reduce the expense of operation; particularly when the only reason given for invoking the aid of the Commission by the complaining carrier, which is not subject to its jurisdiction, is that such complainant will be subjected to increased expense

in the conduct of its business if the railroad should establish the transfer point at some other place on the river, notwithstanding that such additional expense would be occasioned entirely by the method which is employed by such complaining carrier in handling its freight at different points on the river. Over the complainant's business and the method by which it is conducted, so far as this present case is concerned, the Commission has no control whatsoever; but even if it had, it is not our idea that the law of regulation as now administered ever contemplated that one carrier, regardless of its own interests as well as those of the public, should be compelled so to conduct its business as to best accommodate the business of a competing carrier, and that no change should be permitted in the methods of operation if such competing carrier objects even though the shippers of freight and the public in general are in no way discommoded or subjected to an unreasonable expense by the proposed change. If such a thing were possible, it is needless to say that endless confusion would result, and the methods adopted by a carrier for conducting its business would, at all times be subject to attack by other carriers who might consider that some of their alleged rights and interests were affected. So far as it appears in this case, there is no question but what the patrons of The Delaware and Hudson Company north of Albany will be as well accommodated by the proposed transfer of freight between the boats and cars at Albany as they are at Green Island, because there seem to be ample facilities at Albany for handling all such freight at that point. In addition to this, the railroad company will be saved the expense of operating a transfer at Green Island where only carload freight is handled by the boats at the present time, and if this can be done as claimed, without prejudice to shippers, there appears to be no reason whatever for subjecting the railroad company to the expense of maintaining two transfer points so close together. The highest court in the land has determined that the location of

stations and warehouses by railroads involves a comprehensive view of the interests of the public as well as of the corporation and its stockholders, and that this is one of the matters which can more appropriately be determined by the directors of a corporation, or in case they abuse their discretion, by the legislature or an administrative board entrusted by the legislature with that duty. (*Northern Pacific Railroad Co. v. Washington Territory*, 142 U. S. 492. See also *Board of Trade of Monroe v. Erie R. R. Co.*, III P. S. C. 2d D. Rep. 226-230.)

Beyond all this, unless it can be clearly shown that the interests of the general public will be materially impaired by the removal of a station from one point to another point, or that the public will be better served by the maintenance of the station at the existing place, the acts of the corporation in this regard should not be interfered with. (*Jones et al. v. St. Louis and San Francisco Railroad Co.*, 12 I. C. C. 144-150.) We believe this reasoning applies with equal force to the re-location by a carrier of a transfer terminal where it interchanges freight with boat lines, and that unless it fully appears that the public would be unduly prejudiced by such a change, the Commission should not attempt to prevent such action even if it had authority so to do.

For the reasons set forth herein the complaint should be dismissed, and an order to that effect entered in due course.

IRVINE, *Commissioner*:

I concur in the result and for the most part in the reasoning of the opinion herein. The complaint is not on behalf of shippers or consignees but on behalf of carriers by water who are not common carriers within the definition of the term as used in the Public Service Commissions Law, and contained in subdivision 9 of section 2 of that law. Therefore section 35 of the Public Service Commissions Law does not apply, and I find no other provision which can be

construed to require railroad corporations to provide any particular facilities for the interchange of freight between their lines and boats. On the contrary, section 69 of the Railroad Law requires a railroad corporation to receive freight at any station on its line marked to go by way of boat or any particular line of boats from any station on its road at which such boat or line of boats terminates or stops for freight, and to transport such freight to such station, and on its arrival to cause the proprietors of the steamboat line to be notified of such arrival and to deliver such freight to such proprietors or their agent with the bill of charges thereon, for the payment of which charges the proprietors of such steamboat line shall be responsible. This clearly indicates that the duty of the railroad company, so far as fixed by law, is to deliver the freight to the proprietors of the steamboat line at the station of the railroad. There is no other provision for interchange.

The Commission having no authority to grant relief of the character sought, I prefer to express no opinion upon the merits of the controversy.

In the Matter of the Petition of the BINGHAMTON LIGHT, HEAT AND POWER COMPANY under section 69 of the Public Service Commissions Law for authority to execute a first refunding and improvement mortgage, issue \$775,000 of 5 per cent 30-year gold bonds to be secured thereby, and to issue \$300,000 6 per cent cumulative preferred stock. [Case No. 5308.]

Under sections 55 and 69 of the Public Service Commissions Law, common carriers, railroad corporations, street railroad corporations, gas corporations, and electrical corporations are expressly authorized to issue securities for the purpose of maintenance of service and of making replacements; and the Public Service Commission is similarly authorized to approve by its order such issue of securities. In such an order of approval the purposes for which such securities or the proceeds thereof are to be used must be expressly and distinctly stated and certified, and the transaction safeguarded by a requirement for due and timely amortization or a provision for other method of extinguishment of the charges thus created. Citing *People ex rel. B. L. H. & P. Co. v. Stevens*, 203 N. Y., p. 7.

Decided April 11, 1916.

Appearances:

William S. Barstow as president of, and *Curtis, Keenan and Tuthill* attorneys for petitioner.

VAN SANTVOORD, Chairman:

Under its petitions herein of November 29 and December 18, 1915, respectively, the Binghamton Light, Heat and Power Company has asked for approval by this Commission of first, the execution of an open mortgage on its property to secure bonds to a maximum amount not specified; second, for authority to issue at once \$798,000 face value of bonds secured by such mortgage, of which \$500,000 are to be sold at 90 per cent of par and interest, and \$298,000 are to be sold at not less than 87½ per cent of par and accrued interest; third, for authority to issue 6 per cent cumulative preferred capital stock to an amount of \$280,300 at par value; and fourth, for authority to use said bonds or the proceeds

thereof amounting to \$710,750, and said preferred stock or the proceeds thereof amounting to \$280,300, making in all \$991,050, for the following purposes:

1. For the reacquisition of its first refunding 5 per cent gold bonds	\$449,000.00
2. For exchange on the basis of par for par for 6 per cent non-cumulative preferred capital stock now outstanding.....	150,000.00
3. For the discharge of promissory notes outstanding.....	288,338.48
4. For proposed expenditures for additions and betterments to its property	77,300.00
5. For working capital	26,411.52
	<u>\$991,050.00</u>

In its consideration of such application this Commission directed its division of capitalization and its electrical engineer to examine the accounts and property of the petitioner and to prepare such a statement of the corporation's assets and liabilities as would enable a determination of the true relation between the petitioner's existing assets and its present liabilities. The petitioner represented to the Commission that its financial obligations demanded prompt consideration for the purpose of an adequate and stable readjustment thereof and accordingly urged that its application receive early attention. In order to progress a conclusion the petitioner entered into a stipulation which is to be embodied in the order to be entered herein, such stipulation being to the effect that the corporation will correct its fixed capital and other accounts to conform fully with the requirements of the Uniform System of Accounts for Electrical Corporations; that it will set up and maintain an adequate reserve for accrued amortization of capital; and that it will amortize through earnings any deficiency in its assets, including an admitted deficiency in its reserve for accrued amortization as compared with its liabilities, such amortization to be in the manner and at the rate prescribed by the Commission. This stipulation is executed by the president of the corporation under authority of its board of directors.

The results of the examination of the petitioner's accounts and property so far as affects the statement of the corporation's assets as of December 31, 1915, have been accepted

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and acknowledged as correct by the petitioner, with the following resultant balance sheet of the corporation:

<i>Assets Side</i>	
Fixed capital	\$817,019.27
Materials and supplies.....	11,269.80
Other current assets.....	39,991.28
Miscellaneous temporary debits.....	14,358.58
Unamortized replacements and depreciation suspense.....	698,973.30
Total assets side	\$1,581,612.23
<i>Liabilities Side</i>	
Capital stock, preferred	\$150,000.00
Capital stock, common	500,000.00
Funded debt	453,000.00
Bills payable	306,216.95
Accrued taxes and interest.....	11,083.99
Other current liabilities.....	18,649.20
Reserves:	
Accrued amortisation of capital.....	120,004.66
Other reserves	8,738.50
Corporate surplus	23,918.93
Total liabilities side	\$1,581,612.23

In the order to be entered herein the petitioner will be required to adjust its accounts to accord with the above statement of assets and liabilities; to amortize through earnings at the rate of \$7500 per year during each of the calendar years 1916 and 1917 the suspense account entitled "Unamortized Replacement and Depreciation Suspense" of \$698,973.30 appearing on the above balance sheet, which on the date mentioned is the amount of excess of liabilities over assets of the corporation — which latter will be required to make application to the Commission "within thirty days after January 1, 1918," for a determination of the method, including the precise rate and amount at and under which the corporation shall thereafter periodically amortize the account last above referred to. Upon such application it is understood that the Commission shall prescribe an amortization scheme intended to result in the creation of assets at least equivalent in value to all outstanding liabilities of the corporation either by the setting apart of earnings or through liquidation of such liabilities in whole or in part which may be otherwise provided for. The applications which have been filed in this case have included authorizations asked for by the same corporation in cases Nos. 741 and 2695 before this Commission, and the records in those

cases, so far as the same are pertinent, have been considered by the Commission in its disposition hereof.

The question has been more or less seriously pressed whether the decision of the court of last resort on appeal from an earlier determination by the Public Service Commission in this case raises doubt as to the power of this Commission to authorize, under any circumstances and under whatsoever safeguards or restrictions, issuance of securities by gas or electrical corporations for the purposes of maintenance of service and replacements. The question is based upon the following language used by the Court in the case referred to (*People ex rel. B. L. H. & P. Co. v. Stevens*, 203 N. Y., pp. 7 and 21):

The amendment of the statute of 1910 gives to the commission authority to authorize the issue of stocks, bonds, notes or other evidences of indebtedness of a corporation payable at periods of more than twelve months after the date thereof for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury of the corporation not secured or obtained from the issue of stocks, bonds or other evidence of indebtedness of such corporation within five years next prior to the filing of the application, but it expressly excepts from such authority of the commission the right to authorize the issue of such stocks, bonds or other evidence of indebtedness for maintenance of service and for replacements.

We can not construe the opinion of the Court of Appeals in the case cited as intended to deny the right of a gas or electrical corporation to issue its securities (and of this Commission to approve of such issue) for the purpose of maintenance of service or replacements. A careful examination of the opinion and of the record in the case plainly leads to the conclusion that in its consideration of the particular issue involved the Court treated the order of the Commission as approval of a proposition to permanently capitalize an expenditure—or at least a portion thereof—which properly should have been charged to operating expenses. The order of this Commission which was being tested on appeal determined that the proceeds of certain notes issued

by the company to the amount of \$158,000 had been used for purposes properly chargeable to operating expenses and accordingly were not proper subjects of capitalization without adjustment and provision for meeting the same out of income. But it further provided that in view of certain provisions of a proposed mortgage by the company the result of which would be in effect to amortize at least \$58,000 in amount of the last mentioned sum, and upon the understanding that, as incidentally determined by the Commission, the fixed capital of the corporation should be credited with the sum of \$100,000, which might be accomplished by a reduction of the capital stock by a like amount, the objections stated to the capitalization of said sum of \$158,000 would be removed (see case No. 724, p. 832, Vol. I, Annual Report for year 1910, P. S. C., 2nd District). The Court, however, declared that the Commission was absolutely without authority to require such surrender of stock in order to thereby enable crediting an equivalent sum to fixed capital; and presumably concluded that at least to the extent mentioned, namely of the sum of \$100,000, in the absence of any requirements or provisions for the ultimate amortization of the amount from future earnings of the company or otherwise, the proposed issue of securities would in effect capitalize replacements and accordingly could not be justified. In short, the manifest intent of the Court's determination is to declare a want of power in the Commission to approve of the issue of securities which would result in increasing the capital burdens of the corporation beyond the point where it would be possible to find property behind outstanding indebtedness. Thus, after discussing at some length the duty of a corporation to make provision for replacing worn-out tools and to provide for ordinary plant depreciation, the opinion states "if that is not done, and *renewals and replacements* are continually added to the *capital account*, the capital account must necessarily become more and more out of proportion to the real value of the property of the corporation".

We conclude the foregoing to indicate the real intent of the Court in its use of the language just above quoted, for the reason that any other construction would amount to a determination that the corporation can not do a certain thing which by statute (section 69 of the Public Service Commissions Law) it is expressly authorized to do. Thus, as quoted by the Court in the opinion under consideration, section 69, as amended in 1910, expressly authorizes gas or electrical corporations to issue securities for the following purposes: 1, Acquisition of property; 2, The construction, extension, or improvement of its plant or distributing system; 3, *The improvement or maintenance of its service*; 4, The discharge or lawful refunding of its obligations; 5, The reimbursement of its treasury for moneys actually expended from income (under certain restrictions as to the time of such expenditures in relation to date of application for such reimbursement) for any of the first four purposes mentioned *except maintenance of service and replacements*. To construe the Court's language above quoted as a declaration against the authority of the Commission to approve the issuance of securities for maintenance of service and replacements *under any circumstances* would be tantamount to asserting that after specifying various distinct purposes for which securities may be issued provided the issue thereof shall be authorized by the Commission, the statute nevertheless declares that authorization by the Commission is *not* permitted in one of the cases mentioned (the third above enumerated)—which of course would be a most absurd proposition. Under the amendment of 1910 the purposes for which such securities may be issued were enlarged by inclusion of the one last above recited in the language following:

—or for the reimbursement of moneys actually expended from income, or from any other moneys in the treasury of the corporation not secured or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation, within five years next prior to the filing of an application with the proper commission for the required

authorization, for any of the aforesaid purposes except maintenance of service and except replacements, in cases where the applicant shall have kept its accounts and vouchers of such expenditure in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which such expenditure was made.

This is the first appearance in section 69 of the words "except maintenance of service and except replacements," and from the context it appears that their use in this connection was intended only to qualify to the extent mentioned the newly provided right to reimburse the treasury for money expended from income. Additional and, as it would seem, absolutely convincing evidence that this was the legislative intent appears in a further modification of section 69 by the amendment of 1910, to the effect that the order of the Commission which authorizes the proposed securities must state "the purpose to which the issue or proceeds thereof are to be applied" and that in the opinion of the Commission the money, property, or labor to be procured or paid for by the issue of such securities is or has been reasonably required for the purposes "*specified in the order and that except as otherwise permitted in the order in the case of bonds, notes and other evidence of indebtedness, such purposes are not in whole or in part reasonably chargeable to operating expenses or to income*".

The gist of the foregoing requirement as to what the authorizing order of the Commission must contain is that securities thus authorized must be certified by the Commission as reasonably required for one or more of the five purposes above specified; and that *except as otherwise permitted* in the order such purposes are for capital account only. In the words "except as otherwise permitted in the order" we find precise admission of an understanding that the Commission may "permit" issuance of corporate securities for purposes chargeable to operating expenses or to income—that is to say, securities to be used for purposes directly the opposite of capitalization. In view of all this, can it seriously be contended that the statute does not

authorize the Commission to approve securities issued for maintenance of service and to make proper replacements?

To deny the right of the corporation to issue securities under such circumstances — which would be the equivalent of denying the authority of the Commission to approve of such an issue — would inevitably result every now and then in throwing into bankruptcy corporations which may have been temporarily unfortunate in their business operations, under circumstances which would not only do violence to both the judgment and sense of justice of the Commission but which would operate to the disadvantage of both public and private interests involved.

Regulation of the issue of securities by common carriers, railroad corporations, and street railroad corporations is controlled by provisions of the Public Service Commissions Law precisely like those, above quoted, which govern in cases of gas or electrical corporations (section 55 P. S. C. Law); and accordingly in respect of all such corporations the Commission has invariably assumed the authority under discussion. Almost immediately after the decision of the court of last resort above referred to, the Commission did not hesitate to make an order approving the issue of securities for operating expenses, and from that time down to the present has again and again exercised such authority without challenge from any source of its power in the premises.

We unanimously and unhesitatingly affirm our conviction that under the Public Service Commissions Law this Commission has authority to approve the issue of corporate securities for the purpose of maintenance of service and of making replacements, provided that such purposes shall be expressly and distinctly stated and certified in the Commission's order of approval, and that the transaction shall be safeguarded by requirement in the order for due and timely amortization or some other adequate provision for extinguishment of the charges thus created. We believe that the Court of Appeals has never questioned nor intended to question said authority.

In the Matter of the Complaint of FRANK B. SAUNDERS of Sodus, Wayne county, *against* AMERICAN EXPRESS COMPANY, asking for collection and delivery service. [Case No. 5388.]

On the facts stated in the opinion, *Held*, that the refusal of an express company to extend its free collection and delivery limits so as to include the place of business of the complainant operated as an unjust discrimination against complainant, and it was ordered that the free delivery limits be extended accordingly.

Decided April 18, 1916.

Appearances:

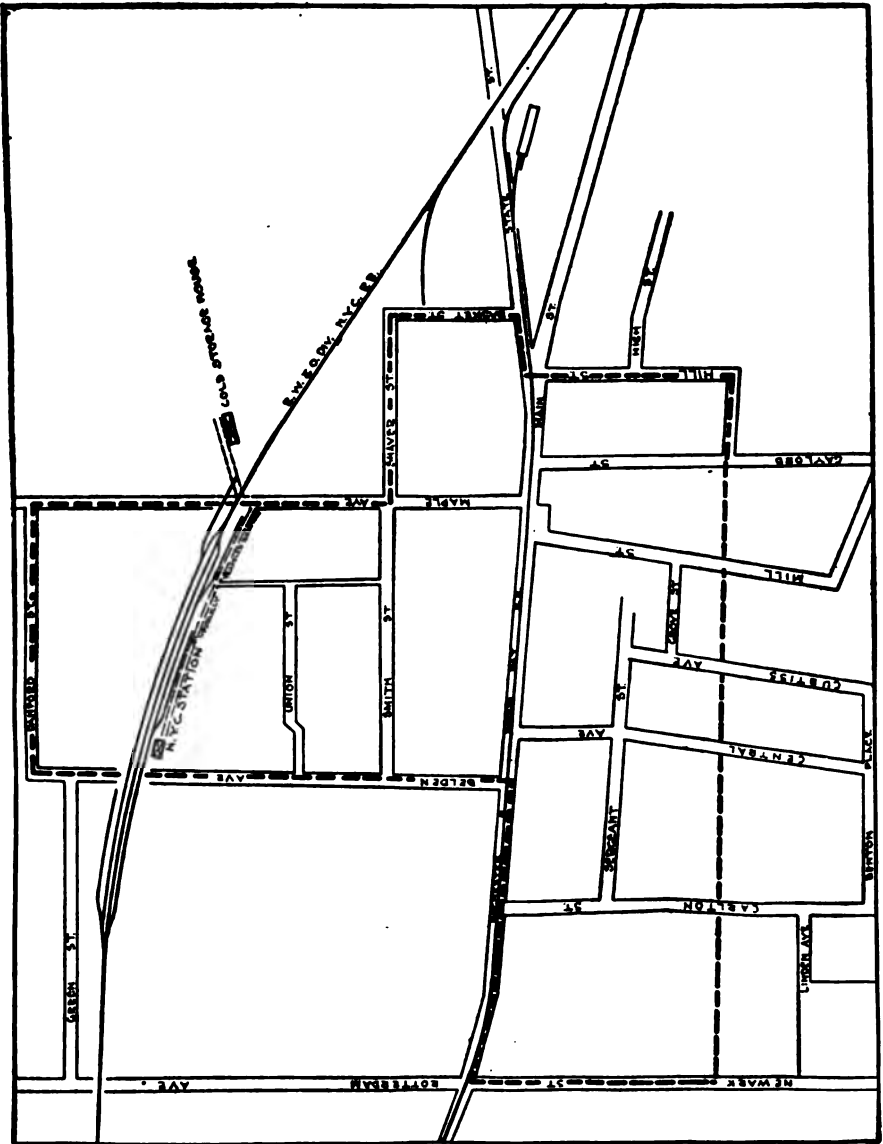
Richard L. Saunders, Rochester, N. Y., for complainant, who also appears in person.

H. C. Heacock, Buffalo, N. Y., its Division Superintendent, for American Express Company, respondent.

IRVINE, Commissioner:

The complainant is a considerable shipper of lettuce and celery by express from the village of Sodus, in Wayne county. The American Express Company is the only express company there operating, and transacts its business over the lines of the Ontario division of the New York Central railroad. The complaint is based upon the refusal of the express company to furnish collection or "pick-up" service to the complainant, although he alleges that free collection and delivery service is furnished to others in the village.

Sodus is an unincorporated village so that it has no definite boundaries. The general situation is shown by the accompanying map. The free collection and delivery district is indicated by a heavy broken line. The office of the express company is in the station of the New York Central railroad so indicated. The place of business of the complainant is



in the building indicated by the words "Cold Storage House". There is a publicly traveled roadway, not however officially a highway or street, extending from Maple avenue almost at the point where the roadway from the cold storage plant debouches into Maple avenue along the south side of the New York Central tracks to the station and to Belden avenue. The distance from the center of Maple avenue along the roadway to the doorway of the complainant's place of business in the cold storage house is about three hundred and fifty feet. A part of the cold storage house is occupied by a business concern styled by the witnesses in some places the Consolidated Celery Company and in others Smith and Bennett. Its business is the same as that of the complainant, and the complainant testifies and it is uncontradicted that it is at least five times as great in volume as his own. It maintains its own team and wagons and delivers its goods to the express company at the station. The complainant has his goods delivered to the express company at the station by a drayman who charges him fifty cents a load. The reason given by the express company for denying the collection service is "that the business of Mr. Saunders does not amount to a very great deal proportionately, and the cost that would be entailed by extending the wagon service would be out of proportion to the business done". In support of this it is stated that the express company now has its entire Sodus collection and delivery service performed by a drayman for the price of \$25 per month; that this service could not be extended to the complainant except at an additional cost of \$26 per month; and to Smith and Bennett at a still additional cost of \$26 per month.

It is impossible from the evidence to determine exactly the amount of business furnished by the complainant to the express company. The complainant testifies to the volume of business by weight. His testimony shows shipments from June, 1915, to and including February, 1916, as follows: June 15, 1430 lbs.; July, 8460 lbs.; August,

16,610 lbs.; September, 10,530 lbs.; October, 3080 lbs.; November, 6130 lbs.; December, 4420 lbs.; January, 12,250 lbs.; February, 4500 lbs.

The testimony on behalf of the express company is that the receipts from complainant's business from October, 1915, to January, 1916, were as follows: October, \$22.39; November, \$53.05; December, \$39.69; January, \$69.86: a total of \$184.99, or an average of \$46.25. While it is impossible upon the evidence to compare these figures by translating pounds into dollars, in the absence of information as to weight and destination of packages, it may be inferred from what has already been stated that the complainant's business must be quite large as compared with the average business of other members of the community, and that the combined business of the complainant and of Smith and Bennett must constitute a very large proportion of the total express business transacted at Sodus. If all the other business is handled by a drayman at a rate of \$25 per month, and it will cost \$26 per month additional for the comparatively short haul required by the complainant, and \$52 per month extra for the equally short haul of the complainant and of Smith and Bennett, it is quite evident that their shipments are very large in comparison with the shipments of others in the community.

It is manifest that some geographical limits must be fixed for collection and delivery service; that such limits must be more or less arbitrary, and that the fixing of such limits must inevitably work out discriminations for and against certain persons: but discriminations required by the necessity of fixing arbitrary limits are not necessarily unjust and therefore unlawful. In this case, however, the discrimination effected by the arbitrary fixing of Maple avenue in the region concerned as the eastern limit of the free district does operate as an unjust discrimination against large patrons. The roadway from Maple avenue to the complainant's place of business is an open way although not a public highway,

and the haul along it is short. If the complainant should load his produce upon hand trucks and push them about one hundred yards to the edge of Maple avenue, the express company would be required to call for the goods there and haul them to the station. If an individual with a house on Hill street, at the extreme southeastern limits of the free delivery district, should see fit to raise for the market a few pounds of celery or of lettuce the respondent would send to that point for it. The wagon employed by the express company would and does call and deliver for a number of residents along Maple avenue at a much greater distance from the station than the plant of the complainant.

The additional expense entailed by performing the service for the complainant or for the complainant and Smith and Bennett in case they should desire such service can not be urged to support the discrimination against them.

The map in evidence was published several years ago, but it is conceded that it substantially represents the present situation. This shows about two hundred and fifty buildings within the free delivery limits. If \$25 a month pays for the collection and delivery service at two hundred and fifty points, and if it would require \$26 per month additional to perform such service at one more point much more conveniently reached than most of the two hundred and fifty, it indicates a volume of business at that point so great in comparison that respondent can well afford to take care of it or else that its present service is performed at remarkably small cost.

On the record before us we need not discuss the question whether an express company may refuse collection service to a shipper because of the large volume of his shipments and his ability to perform the service more economically himself. No such situation is presented by the evidence. Furthermore, this would also present the question whether there should not be a difference in rates between those whose goods are collected by the express company and those who

deliver their goods at the station. The Commission is not passing on either question.

It appears that there are no others than the complainant and Smith and Bennett so situated as to require further readjustment of the free district. If there were many such it should be generally increased. As the situation stands, the respondent should extend its free collection and delivery district so as to include the roadway leading to the so called "Cold Storage House" as shown on the map and should amend its tariffs accordingly.

All concur.

In the Matter of the Complaint of INHABITANTS OF THE VILLAGE OF LEROY *against* THE PAVILION NATURAL GAS COMPANY as to the "minimum charge" for gas service. [Case No. 5489.]

Where the maximum rate for natural gas is restricted to forty cents per thousand cubic feet, by the terms of a municipal franchise granted to and accepted by a gas company, a "minimum charge" of fifty cents for such gas service is unauthorized and can not be justified by the Commission; because, by analyzing such minimum charge, it appears that, by enforcing the same, the company might thereby exact a maximum charge greater than the amount prescribed by the franchise.

That the phrasing of the clause as to such "minimum charge" in the company's rate schedule, filed with the Commission, is objectionable; but the Commission approves and authorizes a fixed monthly service charge of fifty cents, applicable to all customers, which will include all items of expenditure by the company in holding itself in readiness to serve such customers, and will also cover all gas used during the period for which such charge is made.

Decided April 20, 1916.

Appearances:

William F. Huyck, LeRoy, N. Y., Attorney for the Village of LeRoy.

J. S. L. Purdy, LeRoy, N. Y., Manager, for The Pavilion Natural Gas Company.

HODSON, Commissioner:

A stipulation has been filed with the Commission, duly executed by the President and Trustees of the Village of LeRoy, and The Pavilion Natural Gas Company, whereby the controversy between said parties is submitted to the Commission for decision, in lieu of the usual proceeding by complaint and hearing.

Such stipulation clearly states the question at issue, and as it relates to the practices of the gas company, as a public utility, and involves the construction of certain clauses contained in the franchise, under which the company is operating

in the village of LeRoy, and both parties agreeing to abide by the decision herein, there can be no objection to a compliance with their request.

The Pavilion Natural Gas Company is a corporation duly organized under the laws of this State, has its principal business office in the village of LeRoy, and has extensive transmission and distribution systems in various municipalities throughout Genesee and Livingston counties, including LeRoy, through which the company serves its customers with natural gas, produced from its own wells, which are located in said field.

On the 3rd day of July, 1906, the local authorities of the Village of LeRoy, duly granted a franchise to the gas company, to lay and maintain a system of mains, conduits and appliances in and through the streets and public places of the village, for the purpose of furnishing natural gas to the village and its inhabitants for fuel and lighting purposes; and certain provisions of such franchise are the subject of this inquiry. The gas company accepted the franchise whereby it became bound to comply with all such provisions.

The terms of the franchise, which relate to the question presented, are the fourteenth and fifteenth paragraphs, and they prescribe the character of service and the maximum rate chargeable by the company to consumers of gas within the village. Such conditions read as follows:

Fourteenth: Said company shall and will furnish natural gas to its customers who shall have complied with the rules and regulations of said company, and in reference thereto, at a uniform rate or price per thousand cubic feet of gas consumed; and the said company shall, before commencing business in said village under this grant, make and file with the village clerk a schedule which shall contain the price which said company will charge, not exceeding the maximum amount named in this grant for supplying natural gas to the customers, and all changes thereof which may from time to time be made.

Fifteenth: Said company may at any time make and file a new schedule of price, provided, however, that at no time shall said company fix, collect or charge a greater rate of any consumer or consumers than the maximum amount fixed by this agreement, and the price

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named in the first schedule or any succeeding schedule shall not exceed 40/100 of a dollar for one thousand cubic feet of gas when used in any manner.

The Fourteenth condition of such franchise requires The Pavilion Natural Gas Company to make and file with the village clerk a schedule containing its gas rates and also from time to time to file notices of any changes which may be made in said rates. The Public Service Commissions Law requires that the company shall file with the Commission a tariff schedule, wherein shall be stated the charges proposed to be made by the gas company for the various kinds of service rendered to the public. Pursuant to the first of such requirements the gas company has filed various notices with the clerk of the Village of LeRoy, in which the classified services of the company are described, and the charges therefor are therein stated; the last of said notices was filed with the village clerk of LeRoy June 25, 1915, and reads as follows:

LEROY, N. Y., June 25, 1915.

Village Clerk, LeRoy, N. Y.:

DEAR SIR: The following schedule of rates have been submitted to and approved by the Directors of this Company, and commencing July 1st will take effect.

The applicant agrees to pay at the rate of 40¢ per M cubic feet with discount of 5¢ per M for bills of 10,000 cu. ft. or less; 7¢ per M when more than 10,000 cu. ft. is used, and 12½¢ per M when more than 100,000 cu. ft. is used. In no case shall the minimum charge be less than 50¢, and the applicant agrees to pay at the local office within the required collection period, otherwise the rate per M will be 40¢.

Very truly yours,

THE PAVILION NATURAL GAS CO.,

By G. W. Daggs, Ass't Mgr.

It will be noticed that the portion of this communication, which is here being considered, is the clause which reads "in no case shall the minimum charge be less than 50¢". In the general schedule of rates, filed with this Commission by The Pavilion Natural Gas Company, October 6, 1915, the company has fixed its rates and charges for the various classes of service of natural gas in the village of LeRoy, and in

such schedule has also incorporated a notice which provides that the minimum monthly rate shall be fifty cents.

When the Fourteenth paragraph of the franchise says that "the company shall furnish natural gas to its customers," it means that the company will furnish such gas when and as required by such customers, and in addition thereto, it means that the company must stand ready to furnish such gas at all times whether the same is used or not. This is known as readiness to serve, and involves many items of service and expenditure on the part of the company which are rendered and incurred for and on account of the customers, and consists of keeping the distribution system in order, reading meters, answering complaints, correctly keeping a record on its books of the customers' accounts, and in general attending to the convenience and demands of the customers in their utilization of gas upon their premises. The physical use of the gas is merely one phase of the service which the company is called upon to furnish; and the price fixed for the same by the Fifteenth paragraph of the franchise comprehends these other elements and services, besides the actual consumption of gas. When, however, gas is not used by a customer in billing quantities, such other elements of service, as distinguished from the actual delivery and consumption of gas, require constant expenditure on the part of the company, and although there is no provision in either of said paragraphs for compensation to the company for such services, there can be no reason why the company should not be paid for the same. The law contemplates that while the public is entitled to a reasonable service from the company, the latter should have a fair return therefor. This service is not limited to the sale and delivery of gas, but includes all other services on the part of the utility which are rendered for the benefit of the consumers. Apparently this is the basis for the charge which is made by the company to those of its customers who fail to use gas in billing quantities, and which is designated in the tariff schedule filed

with the Commission, and also in the note served upon the clerk of the Village of LeRoy, as a "minimum charge".

There is considerable variance between the memorandum in the filed tariffs of the gas company, relating to such minimum charge, and the clause pertaining to the same in the note filed with the village clerk of LeRoy; in the former, which has to do with the service of gas in said village, and the rates to be charged therefor, the language is "minimum monthly rate 50¢," while in the latter, which is a communication to the village clerk of LeRoy, fixing the scheduled rates of the company for gas service in that village, the language is "in no case shall the minimum charge be less than 50¢". Nowhere in the filed schedule of rates of the company is there any provision that any collection periods are fixed, monthly or otherwise, although there are several references to the payment of bills and discounts thereon, which seem to indicate that bills will be rendered monthly; and as to such communication to the village clerk, there is nothing which indicates the period of time for which the minimum charge of fifty cents is made, and if that charge is continued in any form then such ambiguity should be corrected.

A gas rate is made up of, at least, two elements, the charge for the quantity of gas used, and the charge for being ready to serve. The existing filed schedule of the company probably seeks to provide for both these elements, and the question involved here is whether such charge, including a readiness to serve, as well as gas service, can be justified under the plain provisions of the franchise which fixes the maximum charge at forty cents per thousand. We are of the opinion that there is grave doubt concerning such charge, as the same is now phrased, even though a casual reading of the language used conclusively shows that, by the collection of such "minimum charge," where the consumption of gas is less than 1250 feet, a rate in excess of forty cents per thousand is exacted. Perhaps, in the absence of such franchise restrictions as to price, the charge of fifty cents per month, even

though the same should be considered as payment for a small amount of gas at a greater price than the scheduled rate, would be both regular and legal; but the rate restriction in this case must be respected, and, under the circumstances, the company can not charge, nor can this Commission approve, a rate in excess of forty cents per thousand cubic feet, no matter what amount of gas is consumed. The complaint of the people of LeRoy in this case is directed to this particular practice of the company, *i. e.* the fixing of a minimum charge for gas, which, in many cases, is in conflict with the rate restriction contained in subdivision fifteen of said franchise. In the last analysis, however, it will make no difference to such consumers whether they pay such a monthly minimum charge of fifty cents for the use of gas or for other services of the company; but there is a principle involved which must be adhered to, because the question may arise in the future when the Commission might be called upon to apply such principle in cases embodying widely different services and varying charges therefor.

The Commission therefore decides that the rate restrictions contained in such franchise must be enforced in their integrity, because such franchise has been resolved into a binding contract between the parties thereto as well to protect their interests as for the benefit of the gas users of the village. But while holding that the maximum price for gas, used for any purpose or to any amount in the village of LeRoy, shall not be more than forty cents per thousand cubic feet, it is proper for the Commission to also ascertain and determine whether such so called minimum charge can be justified under another designation, which shall clearly distinguish the same from a charge for gas service.

It is common knowledge, and has been pointed out before, that each consumer costs a gas company a considerable sum each month for merely keeping his name on the books of the company, reading his meter, traveling to and from his premises for that purpose, and standing ready at all times to answer complaints, make repairs and furnish gas service;

these and other items of actual out of pocket expenditures are required of the company, as a public utility, even though the customer consumes, and pays for, no gas whatever. Thus, each consumer is a fixed and definite charge upon the company, irrespective of the consumption of gas, and, from a financial standpoint, as well as from an abstract proposition of fairness, it must be said that he should pay his fair share of the actual cost which the company incurs by keeping itself in readiness to supply him with gas.

These separate expenses incurred for the individual consumers go to make up the total operating expenses of the company, which in turn represent a large part of the entire cost of service, and it is only proper and just, where this expense is ascertained, and is uniform as to all consumers, that the same should be returned, in part at least, to the company. There seems to be no disposition on the part of the village to question the reasonableness of such charge for some service, and were it not for the restriction put upon the company as to its maximum rate for gas, the Commission would not hesitate to approve of such charge of fifty cents, even though the same would slightly increase the maximum rate, because the greater portion of such charge would be made for services other than the furnishing of gas.

The Public Service Commissions Law gives the company no choice as to whom it shall serve; the company may be required to tap its main along a street and make connections for private service with fifty consumers, and yet none of them is obliged to guarantee a certain consumption of gas; all the while, however, the company, at the expense above mentioned, holds itself in readiness to serve all of such customers. A consumer, when he agrees to take gas, also agrees to pay for the same at the rate fixed between the parties; this agreement comprehends an obligation upon the part of the consumer to take and pay for a reasonable amount of gas; and if he does not do this, he can not be absolved from the payment of such reasonable sum as may be charged by the company for standing ready to furnish such gas.

In this case, the company desires to provide for a situation where, after installing a gas main in the street and connecting the same with the service on said premises, installing the meter and rendering all the services hereinbefore mentioned, in holding itself in readiness to serve the customer with gas, it finds that the customer uses either no gas at all or a quantity which yields a net return of less than fifty cents per month, and which does not justify the making and collection of monthly bills. A way should be found, therefore, whereby a reimbursement may be had by the company for the actual expenses incurred in maintaining a readiness to serve that class of customers. Such a practice is not uncommon, and has uniformly been approved by this Commission; for it will be observed that such charge does not violate the law prohibiting a meter charge, nor is it connected in any way with the price or rate for the gas itself.

The Commission, therefore, favors a monthly charge as proposed by the company, but disapproves of the phrasing made use of in the tariff schedule filed with the Commission. A statement of such monthly charge, together with the purpose of the same, should be inserted in the company's schedule of rates for natural gas in the village of LeRoy, and filed with the Commission, the same to be substantially in the following form:

A service charge of 50 cents per month will be made against each consumer unless his net bill for gas consumed during the month shall equal or exceed 50 cents. The monthly service charge will cover all gas furnished during the period for which such charge is made.

An order should be entered in accordance with the views expressed in this decision, and special permission given to the company to make and file such amended schedule upon five days' notice.

All concur.

Complaint of the CITY OF COHOES by its Mayor, and in the Matter of the Complaint of BRUNO E. AMYOT as treasurer of the Business Men's Association and Board of Trade of Cohoes and vicinity *against* NEW YORK TELEPHONE COMPANY as to rates. [Case No. 4755.]

Complaint of the VILLAGE OF WATERFORD against New YORK TELEPHONE COMPANY and AMERICAN TELEPHONE AND TELEGRAPH COMPANY as to rates. [Case No. 4766.]

Complaint of the CITY OF WATERVLIET by its Mayor and Common Council *against* NEW YORK TELEPHONE COMPANY as to rates. [Case No. 4805.]

1. Contiguous communities of individual political entities, varying widely as to population and otherwise, may nevertheless properly be embraced in a single base rate area in which identical telephone service is rendered, at uniform flat rates without charge for toll between the various group exchanges.

2. In an area six miles long by three miles wide, traversed longitudinally by the Hudson river, comprising a city of 78,000 on one side of the river, directly opposite a city of 15,000, a village of 5000, another city of 25,000, and another village of 3500, respectively contiguous to each other in the order mentioned, and all having steam and electric railroad and bridge connections, the resulting community interrelation justifies the establishment of uniform telephone rates for a uniform service throughout the entire area.

3. It seems that a measured rate schedule is the most consistent and equitable rate basis thus far devised and promises the nearest possible approach to abstract justice in the apportionment of charges for telephone service, although the time may not be ripe for its general inauguration.

Decided April 25, 1916.

Appearances:

Edward A. Mealy for the City of Cohoes.

Edgar B. Nichols for the Business Men's Association and Board of Trade of Cohoes.

J. W. Atkinson for the Village of Waterford.

Benjamin W. Knower for the City of Watervliet.

George R. Grant for New York Telephone Company.

VAN SANTVOORD, *Chairman*:

This proceeding is a consolidation of complaints of the Cities of Cohoes and Watervliet by their respective mayors, and of the Village of Waterford by its president, against current rates of the respondent in the cities and village aforesaid. The rates complained of were established on November 1, 1914, following a purchase theretofore concluded by the New York Telephone Company of the business and property, exclusive of the franchises, of the Commercial Union Telephone Company and of the Cohoes-Waterford Home Telephone Company. The Cohoes-Waterford Home Telephone Company had operated as a competitor of the respondent in the city of Cohoes and in the village of Waterford, and the Commercial Union Telephone Company had also operated as a competitor in the city of Watervliet and in the city of Troy. Said competition appears to have been unprofitable, and after the aforesaid purchase of the business and property of its competitors the respondent instituted new rates uniform throughout all of the territory included in the cities of Troy, Cohoes, and Watervliet, and the village of Waterford, such territory being treated as the so called "Troy group," in which identical service was to be furnished all subscribers at the same rates which had theretofore obtained in the city of Troy. The result is that the new rates for Cohoes, Watervliet, and Waterford are not only substantially higher than the previous rates of the respondent's former competitors in the three communities mentioned, but are also higher than respondent's own rates in said communities prior to November 1, 1914. The following three tables show the business and residence rates in the Troy group formerly charged by the competitor companies and by the New York Telephone Company respectively, and the rates now charged by the New York Telephone Company.

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TABLE I
COMPETITOR COMPANIES
Former Rates in Troy Group

<i>Service</i>	<i>Troy</i>		<i>Cohoes and Waterford</i>		<i>Watervliet</i>	
	<i>Bus.</i>	<i>Res.</i>	<i>Bus.</i>	<i>Res.</i>	<i>Bus.</i>	<i>Res.</i>
Individual line.....	48	33	45	30	40	30
Two-party line.....	40		40		30	
Four-party line.....		24		24		18

TABLE II
NEW YORK TELEPHONE COMPANY
Former Rates in Troy Group

<i>Service</i>	<i>Troy</i>		<i>All other communities</i>	
	<i>Bus.</i>	<i>Res.</i>	<i>Bus.</i>	<i>Res.</i>
Individual.....	60	36	48	30
Two-party line.....	48	30	42	24
Four-party line.....		24		

TABLE III
NEW YORK TELEPHONE COMPANY
Present Rates in Troy Group

<i>Service</i>	<i>Troy and all other communities</i>	
	<i>Bus.</i>	<i>Res.</i>
Individual.....	60	36
Two-party line.....	48	30
Four-party line.....		24

Although profoundly conscious of "a bruised soul and a trampled spirit," the complainants offered no evidence in support of their contention that the increase in rates was unjustifiable, but predicated their case entirely upon the propositions embraced in their formal complaint: first, that "until competition was swallowed up in consolidation" all of the companies had maintained the lower rates, which latter accordingly must have been deemed reasonable and proper; second, that in other communities of substantially the same size and business importance as those involved in the complaints herein much lower rates obtain than those now complained of; and third, that rates in Cohoes, Watervliet, and Waterford ought to be less than in Troy for the reason that fewer calls are made by subscribers in these west-of-the-river communities where the service is also essentially a local one.

In the failure of evidence on the part of the complainants, the Commission of its own motion instituted an investigation of the entire subject matter; but not having available

funds and engineering facilities for the preparation and checking of an inventory and appraisal of the respondent's property necessarily employed in the service under examination, directed the respondent to supply such general information as it was believed would enable a proper disposition of the case. Very complete information was thereafter and from time to time presented by the New York Telephone Company, and the facts and figures subjected to careful analysis by the Commission's experts and by counsel for complainants. It appeared among other things that conduct of the telephone business under the competitive conditions which formerly obtained in the Troy group was distinctly unprofitable; but the continued maintenance, in Cohoes and Waterford at least, of the then existing rates in the face of an admitted business loss is explained by the fact that such inadequate rates were the maximum allowed in the franchises under which respondent's competitors operated. In passing it may properly be observed that respondent is not bound by any such franchise rate limitations, inasmuch as its aforesaid purchase included only tangible property and business assets exclusive of franchises. (*Phillip E. Lewis v. New York Telephone Co.*, unreported decision of the Supreme Court in the Fourth Department, and determination of this Commission *In the Matter of the Transfer of Property and Franchises by Telephone Corporations Organized under the Transportation Corporations Law*, II P. S. C. 2nd Dist. Reports, p. 676, which recognized that the physical property of one telephone corporation may be transferred to a similar corporation without the approval of the Public Service Commission. Also see *Wright v. Glen Telephone Co.*, 112 App. Div. 745.)

The Commission's investigation further disclosed that at the time of the consolidation the respondent had the lead in the number of stations in the cities of Troy and Watervliet, while the Home company had the lead in the city of Cohoes and in Waterford. In the whole group the status was New York Telephone Co., 6563 stations; competitor companies,

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6072 stations. Immediately after the consolidation the total number of stations within the group was reduced to 11,234 by the removal of 1401 duplicate telephones; and five months later — on April 1, 1915 — the aggregate number of stations had been still further reduced to 10,933. The net result to respondent in stations and revenues as of April 1, 1915, was as follows:

TABLE IV

	Stations		Revenues	
Troy and North Troy.....	Loss	149	Gain	\$5,268
Cohoes.....	Loss	94	Gain	2,523
Waterford.....	Gain	36	Gain	1,789
Watervliet.....	Loss	94	Gain	2,324
	Loss	301	Gain	\$11,904

The average number of calls per New York Telephone Company station before and after consolidation was as follows:

TABLE V

	Before	After
Troy.....	4.9	6.5
North Troy.....	4.0	5.4
Cohoes.....	4.7	5.8
Waterford.....	4.9	4.7
Watervliet.....	4.9	5.4

In order to ascertain the facts in respect of complainants' allegations that use of the telephone in the three complaining communities is such as to amount almost entirely to a local service, the Commission, at a later stage of the investigation, required the respondent to furnish additional traffic data based upon a new count of messages, from which the use of the service by each subscriber in the entire Troy group was shown in elaborate detail. Following is a summary of this use in the form of percentages of calls between the several subdivisions of the group:

TABLE VI

From	To				
	Troy	N. Troy	Cohoes	Waterford	Watervliet
Troy, Bus.....	82.2	6.6	3.4	1.1	6.7
Troy, Res.....	89.0	4.7	1.8	.6	3.9
N. Troy, Bus.....	46.9	40.5	6.4	2.4	3.8
N. Troy, Res.....	37.4	54.3	3.7	1.8	2.8
Cohoes, Bus.....	19.8	3.4	68.5	4.7	3.6
Cohoes, Res.....	10.7	3.4	78.9	3.4	3.6
Waterford, Bus.....	25.1	6.7	21.3	43.6	3.8
Waterford, Res.....	15.0	5.9	22.4	59.9	1.8
Watervliet, Bus.....	45.8	4.0	4.6	.7	44.9
Watervliet, Res.....	32.2	3.2	4.0	.5	60.1

The detail of traffic study shows a striking variation in the number of calls originating by subscribers paying the same rate for the same class of service; and when the rate paid per call is computed the inequality becomes especially pronounced. The conclusion is unavoidable that the service in the west side communities can not be termed a strictly local service.

The foregoing brief study leads us to a consideration of the important question involved in this case as embodied in the complainants' second and third propositions above recited, namely, whether the communities mentioned are so closely bound together by geographical relations and in business and social interests that for the purpose of telephone rates they properly should be considered as a unit. Insisting that such is the case, respondent declares that the increased rates in Cohoes, Watervliet, and Waterford in fact amounted only to a corrective change, doing away with a discrimination which had theretofore existed if the territory involved properly should have been considered as included in a single group; because, as above explained, prior to November 1, 1914, subscribers in Waterford and in the two cities named had been furnished with the identical service supplied in Troy at a lower rate than obtained in the last mentioned city. In other words, the argument is that under former conditions there were two rates charged for the same service.

The area comprised in the so called Troy group extends, roughly speaking, six miles from north to south on each side of the Hudson river, with an average width of three miles. Troy extends practically the entire length of the area on the east side of the river; while on the west side Watervliet is separated from Cohoes only by the village of Green Island (which is included in the local telephone area), and Waterford lies directly to the north of Cohoes. Each of the four communities on the west side of the river is connected with Troy by a bridge; and there is intercommunication between all of the communities in the group by both steam and electric railroads.

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The complainants referred to a number of communities having populations comparable with those of Cohoes, Waterford, and Watervliet, and in which existing telephone rates are considerably lower than those now complained of. It is, however, to be observed that the cases referred to are of cities or villages located quite apart from other populous communities and served as separate telephone exchanges with an incidental toll charge for connection with other centers; whereas in this case there is free connection with all the exchanges throughout the group area. The population of the communities which make up the so called Troy group, and the number of telephone stations in that group on April 1, 1915, were as follows:

<i>Local area</i>	<i>Population</i>	<i>Stations</i>
Troy.....	77,700	7,894
Cohoes.....	25,090	1,311
Waterford.....	3,330	423
Watervliet (including Green Island).....	20,700	1,305
	<hr/> 126,820	<hr/> 10,933

And it thus becomes manifest that service and rates which obtain in detached communities corresponding respectively in size with the various communities now under consideration are not properly comparable with the services and rates of the Troy group taken in its entirety. A telephone service area more nearly comparable with that of the Troy group is the one which includes the cities of Albany and Rensselaer, with a combined population of 112,000 and a development of 19,193 stations. Prevailing rates in this Albany group are identical with those now in effect in the Troy group.

In view of the foregoing — and because apparently the time is not ripe for the measured rate service hereinafter referred to — a careful study of the traffic involved in connection with the history of telephone growth, development, and use in the various communities which make up the Troy group, indicates such an interrelation of the various units as, in our opinion, justifies the business policy of respondent in establishing a unified service under a flat rate schedule for the entire area. Of course, the establishment of a flat rate under community conditions and relations such as here

exist always and inevitably occasions a charge that the small user pays for the service of the large user. The situation at hand presents a miniature of that which gave rise to the New York City rate case recently decided by this Commission (see Ninth Annual Report, P. S. C., 2nd D., N. Y., Vol. I, p. 218, case No. 4089: *Investigation of Rates and Charges for Service Rendered by the New York Telephone Company within the City of New York*), and it is to be noted generally that under the flat rate schedules now prevailing in the larger up-state communities the rates appear to be less favorable for the small user than under the measured rate schedule prescribed for and now current in the greater city. For this reason, and as possible means of affording relief to at least a substantial contingent among the complainants — the distinctively “small users” — the Commission called upon respondent to prepare and submit a tentative measured rate schedule as a possible substitute for the uniform flat rate tariffs which control throughout the Troy group. In fulfilling this requirement the corporation seems to have endeavored honestly to meet the views of the Commission; and the resulting schedule has received a most careful examination — from the standpoint as well of the respondent in respect of that part of the problem in which is involved a fair and proper return to the enterprise, as of the public in its natural and proper concern for the least possible inequality in the burden upon the user. Indeed it has been almost entirely because of the Commission’s anxiety to thoroughly explore the possibility of a satisfactory disposition of this case under what might prove a convincing demonstration of the measured rate system that the matter was kept open for several months following the actual closing of testimony in the late Autumn; by consent of the parties the hearings having been adjourned at the call of the Commissioner in charge with the express purpose of affording ample opportunity both to thoroughly investigate this particular phase of the subject and to test the sentiment of those most particularly concerned therein. But, although there are

substantial reasons for belief that a measured schedule may in time be accepted as the ideal method in such cases — or at least as the only consistent and equitable telephone rate basis thus far devised — its general inauguration must await further development of what might be called the philosophy of telephone service, with a corresponding enlightenment of the public and the disclosure of a measurable degree of willingness on its part to accept that which promises a nearer approach to abstract justice in the apportionment of charges for telephone service than has thus far been accomplished. In any event, this particular case not only fails to disclose sufficient grounds for adopting the measured rate in the face of the strenuous objections interposed by interested subscribers, but there would be questionable propriety in selecting this community center for its adoption until its merit and fitness shall have been tested and approved in somewhat larger and more important areas.

Consideration has also been given to the possibility of meeting the situation by separate community flat rates lower than the rates fixed for Troy, with an added toll charge of five cents between the various units, perhaps with the option of a general message rate schedule for the entire group. The objection of the complainant communities to such an arrangement will become readily apparent by reference to the above recited summary of telephone use in the several groups (Table VI), from which it appears that in the case of Troy subscribers not over 10 to 11 per cent of the total calls would be subject to such a toll charge; while elsewhere in the group the percentage of calls subject to the toll would be respectively Cohoes, 27 per cent; Waterford, 48 per cent; and Watervliet, 50 per cent.

The disposition of the case to which we have felt compelled is necessarily based upon the assumption that the operating revenue of respondent in the Troy group does not result in an excessive return upon the properly capitalized investment of the corporation as represented and used in that area. As previously explained, a precise inventory and

appraisal has not been made because of the impracticability of so doing under the circumstances. But there is evidence in the case not only that operation before the so called consolidation was to an extent unprofitable but that respondent's noncompetitive operation under existing rates has also resulted in a loss in each separate unit of the combined area. Such estimated operating loss as of April 1, 1915, is as follows:

TABLE VII

Troy and North Troy.....	\$2,738.75
Cohoes.....	818.65
Waterford.....	2,770.04
Watervliet.....	4,125.26
	<hr/> \$10,452.70

Respondent asserts that in a proper development of the consolidated enterprise more than half a million dollars has been properly expended for essential improvements throughout the area comprised in the Troy group. From its general knowledge of the amount and value of property required for adequate telephone service in a business area like that under consideration, the Commission has been able to check with reasonable assurance the statement of revenue and expenses presented by the respondent as the basis of the operating loss above set forth. In the absence of proof to the contrary it accordingly is presumed that under existing conditions results of operation are not such as to warrant either a lowering of the existing rates or the adoption of another form of schedule which would probably result in a material decrease of earnings; and these conclusions bear out the view of the Commission's experts, that having regard to all the circumstances, current rates in the Troy group considered as a unit are not unreasonable and compare favorably with charges for similar service at points of like population and development.

The complaints herein should be dismissed.

All concur.

In the Matter of the Petition of CARPENTER'S BUS LINE, Inc., under chapter 667 of the laws of 1915 for a certificate of public convenience and necessity for the operation of a stage route by auto busses in the city of Watertown, it being proposed that the route shall also be operated between Watertown and the incorporated village of Carthage. [Case No. 5491.]

1. The present law as to stage routes and auto busses (sections 25 and 26 of the Transportation Corporations Law as amended in 1915) relates only to operation upon and along streets, avenues, and public places in cities. Neither this Commission nor the local authorities of cities may rightfully use the power conferred by that statute for the purpose of regulating operation or controlling competition outside the city.

2. The Commission will not impute to a city council in granting or withholding its consent to urban operation an intention to regulate extra-urban competition.

Decided May 2, 1916.

Appearances:

B. A. Gray, Black River, N. Y., and *John H. O'Brien*, Watertown, N. Y., for petitioner.

Charles Norris, Carthage, N. Y., for *Ralph Gates* and *Harold Comstock*, a copartnership operating an auto bus line between Watertown and Carthage, in opposition.

Cobb & Cosgrove (by *Mr. Cosgrove*), Watertown, N. Y., for the Black River Traction Company.

T. M. Ripley, division engineer State Highway Department, Watertown, N. Y.

IRVINE, Commissioner:

Carpenter's Bus Line, Inc., makes application for a certificate of convenience and necessity for the operation of a motor bus line for the conveyance of passengers and baggage over certain streets in the city of Watertown as a part of a line extending from the Public Square in that city over such

streets and thence over highways through certain villages and hamlets, including the hamlet of Deferiet, to the village of Carthage. It is not proposed to carry passengers locally from one point to another within the city of Watertown. At the hearing, besides the petitioner, there were appearances for the Black River Traction Company, operating a street railway system in the city of Watertown; the State Highway Department; and for Messrs. Gates and Comstock, also operating a bus line between Watertown and Carthage. There was no opposition except on behalf of Messrs. Gates and Comstock.

The present law on the subject is found in sections 25 and 26 of the Transportation Corporations Law as enacted by chapter 667 of the laws of 1915. This act relates only to operation upon and along streets, avenues, and public places in cities, and requires as a prerequisite to a certificate of public convenience and necessity from this Commission the consent of the local authorities of the city. The opposition to the granting of this certificate is based upon the theory that the mayor and common council of the City of Watertown, constituting the local authorities within the meaning of the law, intended to grant their consent to the applicant's operation over the city streets solely as a part of a line from Watertown to the hamlet of Deferiet; that they would not consciously have granted consent to operate over the city streets had they known that the purpose was to continue the route to Carthage; that the present application, being for a certificate to operate over the streets of Watertown for the purpose of reaching Carthage, varies therefore from the consent given by the city and has no sufficient "consent of the local authorities" upon which it can be based.

The application made to the mayor and common council recited that a certificate of convenience and necessity had been duly issued by this Commission under the former law for the operation of a line for the conveyance of passengers and baggage over the highways from the village of Deferiet to the Public Square in the city of Watertown, and that said

line had been operated. The request was merely to operate over certain designated streets within the city. The resolution whereby the consent of the city was granted refers only to operation over the designated route within the city of Watertown, and contains no reference to any extra-urban operation. At the hearing, evidence was received of the actual proceedings and transactions before the common council and at the hearing held before a committee thereof, but evidence was excluded as to the intention and motives of the individual aldermen except as disclosed by these proceedings. The result was inconclusive but sufficient appears to guide us to a disposition of the case.

This Commission held *In the Matter of the Petitions of Allen P. Bartholomew and John J. Neil*, Public Service Commission, Second District, Opinion No. 249, that the legislation of 1915 deprived the Commission of all power of regulation of bus lines operating outside of cities, and that to use the authority conferred by that legislation of granting or withholding certificates of public convenience and necessity for operation over streets as a means of regulating competition outside the city would amount to a usurpation of power. It is not conceivable that the local authorities of a city should have any greater authority than the Commission to regulate competition outside the city through the power they possess of granting or withholding consent to operate within the city. Although it is inferable from the evidence that the council of the City of Watertown has informally adopted a policy of granting its consent to enter the city to no more than one line operating over a particular route without the city, we can not attribute to the council, in pursuing this policy, an intention to regulate extra-urban competition. There may be sufficient other reasons for such a policy. For example, the local authorities may believe that ingress to the city should be afforded by means of one bus line, but that if several ran over the same route there would result an undue congestion of traffic, an undue wear of city pavements, or undue speed because of the competition developed. It is

hardly possible that any of these motives actuated the council in the present case. Deferiet is on the road between Carthage and Watertown, so that in any view consent has been given to the operation over the same streets in Watertown by two lines of busses, both operating over the greater part of this route. While the petition to the common council recited former operation between Deferiet and Watertown, the consent granted contained no restriction as to the purpose for which operation within the city was to be permitted. The mayor had direct notice of the hearing in this case, and notice of the hearing was published in two Watertown papers. While certain aldermen were called as witnesses there was no appearance on behalf of the city against the application. Furthermore, if the local authorities were in fact induced by misrepresentation to grant a consent which would not otherwise have been granted, it is not for this Commission in effect to review their action or to annul it; and under such circumstances no vested interest can have been acquired preventing the rescission of such action in a lawful manner.

We hold therefore that the local authorities of the City of Watertown have granted their consent to the operation over the designated streets of the complainant's line. It is merely the extension of a line for which a certificate was granted under the old law, and no reason has been shown why one should not be granted under the present law.

In the Matter of the Complaint of EDWARD S. AGOR *against*
THE NEW YORK CENTRAL RAILROAD COMPANY, asking
an order directing that said company start and run cars
for the transportation of passengers and property at regular
times over the Mahopac Falls Railroad, and establish
and maintain proper and necessary stations on said railroad. [Case No. 5337.]

1. It seems that although a railroad company may be under legal obligation to supply both passenger and freight service, the demand for one branch of such service may be so slight in comparison with the cost and inconvenience of its rendition that the Commission would not be justified under section 26 of the Public Service Commissions Law in making an order requiring the establishment of that branch of the service.

2. Where, however, there is a substantial demand for both branches of service, the Commission must require that both branches be furnished.

3. A corporation which has obtained and exercised the right of eminent domain and assumes the public obligations of a common carrier may not refuse to perform a part of such obligations merely upon the ground that there is a loss in performing that part which reduces the profits accruing from performing other service.

4. The New York Central Railroad Company, as successor to the property, franchises, and obligations of The Mahopac Falls Railroad Company, was ordered to restore passenger service between Mahopac Falls and Baldwin Place, it being found that there is a substantial demand for some such service. It was further provided that such service should be daily except Sunday by one train each way, which might be a mixed train if the railroad so elected.

Decided May 9, 1916.

Appearances:

P. A. Anderson, 13 and 27 South Division street, Peekskill, N. Y., as attorney for complainant, who also appeared in person.

George H. Walker and Frederick L. Wheeler, Grand Central Station, New York city, for respondent.

IRVINE, Commissioner:

The complaint alleges that The New York Central Railroad Company has discontinued all passenger service on its line from Baldwin Place to Mahopac Falls, and asks for an order directing the said railroad company to establish and maintain proper and necessary stations and to start and run its cars for the transportation of passengers and property at regular times between those points. Freight service has not been discontinued and the only station concerned is Mahopac Falls, so that while the complaint alleges the violation of certain previous orders of the Commission in the premises it resolves itself into a demand for passenger service between Baldwin Place and Mahopac Falls.

This general question has been before the Commission so frequently and has been so much discussed in opinions that no long recital of facts is essential. (*Agor v. The Mahopac Falls Railroad Company*, II P. S. C. 2nd Dist. Rep. 560; *Agor v. The Mahopac Falls Railroad Company*, III P. S. C. 2nd Dist. Rep. 46; *Agor v. The Mahopac Falls Railroad Company*, IV P. S. C. 2nd Dist. Rep. 151; and *Agor v. The Mahopac Falls Railroad Company*, IV P. S. C. 2nd Dist. Rep. 617.)

The Mahopac Falls Railroad Company was incorporated under the Railroad Law of 1850 for the purpose of constructing and operating a railroad from Baldwin Place to Mahopac Mines, a distance of about four miles. Mahopac Falls, the only intermediate station, was about half way between the termini. At the start the Mahopac Falls railroad was operated by the New York City and Northern Railroad Company, whose lines connected with the Mahopac Falls railroad at Baldwin Place. It has since been operated by successors of the New York City and Northern, one of which was in turn leased to The New York Central and Hudson River Railroad Company, and this successor, with The Mahopac Falls Railroad Company, was in 1913 merged with The New York Central and Hudson River Railroad Company. The last named company was consolidated with

several other companies December 23, 1914, under the name of The New York Central Railroad Company. In 1900 the line from Mahopac Mines to Mahopac Falls was discontinued and the track removed. The road has since been operated between Baldwin Place and Mahopac Falls but there has been no passenger service except as required by orders of the Commission based on two of the opinions above cited. After the last opinion and the final denial of the New York Central's application for leave to discontinue the Mahopac Falls station, the railroad, availing itself of a statement in that opinion that it could discontinue a train without permission of the Commission, ceased to run the one train each way which had theretofore been operated. Hence the present complaint.

A perusal of the previous opinions leads to the following conclusions:

1. That under the Railroad Law as it existed when The Mahopac Falls Railroad Company was incorporated and which was substantially the same in this respect as section 54 of the present Railroad Law, as well as under the original charter of The Mahopac Falls Railroad Company, it was obligated to transport passengers as well as property;

2. That the operating and successor companies to The Mahopac Falls Railroad Company succeeded to this obligation;

3. That this Commission is without authority to permit the discontinuance of a station where the effect would be to permit the entire discontinuance of this branch of obligated service.

These principles would seem to lead to an immediate conclusion in favor of the complainant. Other considerations, however, must not be neglected. It may be that while the Commission would not be authorized to grant permission to discontinue an existing service the rendition of which is required by law, the demand for such service might be so slight in comparison with the cost and inconvenience of its rendition that the Commission would not be justified under

section 26 of the Public Service Commissions Law in making an order requiring the establishment of such service. This was the view taken by the Commission in *Citizens of Washington County v. Greenwich and Johnsonville Railway Company*, II P. S. C. 2nd Dist. Rep. 37. In that case as well as in the first of the Agor opinions above cited it was held in effect that service will not be required unless there is a substantial demand therefor, and that whether there is such a demand can only be demonstrated by experience. In *People v. Rome, Watertown and Ogdensburg Railroad Company*, 103 N. Y. 95, the Court of Appeals held that while it is the duty of a railroad to furnish service required by its charter and the laws under which it has existed, a mandamus would not issue to require it to rebuild a portion of its line which had been taken up, where it had acquired a neighboring line that rendered substantially the required service to the same communities and service in some respects superior to that rendered by the old line. It seems therefore that we must inquire whether there is a substantial demand for the service sought. It appeared in the evidence upon which the opinion in *Agor v. The Mahopac Falls Railroad Company*, IV P. S. C. 2nd Dist. Rep. 151, was based that during the period covered down to that time there had been an average of 14.5 passengers per day between Baldwin Place and Mahopac Falls. The petition for rehearing alleges that later experience has reduced that average to 10.3. Even accepting the latter figure it indicates a substantial demand for the service although not such a demand as would render separate passenger service in itself profitable to the operating company. The question, however, is not whether the desired service would in itself be profitable but whether there is such a substantial demand therefor as to require the railroad company to render it in performance of its legal obligation. It was found in the proceeding last referred to that the combined freight and passenger operation was not unprofitable. A company which has obtained and exercised the right of eminent domain and assumes the public obligations of a common carrier may not

refuse to perform a part of such obligations merely upon the ground that there is a loss in performing that part which reduces the profits accruing from performing other service. (See *Public Service Commission v. The Westchester Street Railroad Company*, 206 N. Y. 209.) Recent decisions as to the necessity of fixing passenger rates in such a manner that the passenger service will bear its fair proportion of the operating and other expenses are not applicable. They do not hold that a failure to make such an adjustment or even the impossibility of making it discharges the carrier from the duty of transporting passengers when that is a part of its public and legal obligation. Surely, if Mahopac Falls were a way station on the line of a longer railroad the Commission would not permit its entire discontinuance as a passenger station on the showing that it is used by an average of 10.3 passengers per day.

While the Commission is of the opinion that there is such a substantial demand as to require the railroad company to render some passenger service, it will not under the circumstances direct that such service be by means of exclusively passenger or first-class trains. The service to be of any value should be daily except Sunday, a train from Mahopac Falls connecting with the morning train southbound of the Putnam division at Baldwin Place and one leaving there after the arrival of the evening train northbound. If the company finds it practicable to render this service by means of a mixed train, it may so do; and if it finds it practicable to collect fares on the trains or otherwise, without maintaining a ticket agent at Mahopac Falls, it is warranted in so diminishing its expense.

All concur except Commissioner Carr, who took no part in the consideration or decision of the case.

Complaint of ROBERT E. HARBECK of the town of New Hudson, Allegany county, *against* THE PENNSYLVANIA RAILROAD COMPANY and the GENESEE RIVER RAILROAD COMPANY (Erie Railroad Company) as to flooding complainant's farm. [Case No. 4872.]

At certain seasons of the year farm land is flooded by water which escapes from a break in the bank of an old state canal, alongside which are the lines of two railroad corporations. The predecessor of one of these corporations built its road on the disused canal tow-path under conveyance from the State of New York. It is in dispute whether under the conveyance mentioned the State or one or the other of the respondents is responsible for the up-keep of the canal prism and banks at the point in question. *Held*, that inasmuch as any obligation on the part of either of the respondents would under the circumstances be contractual only, this Commission is without jurisdiction to compel repairs which would prevent the flooding complained of.

Decided May 10, 1916.

Appearances:

Walter N. Renwick for the petitioner, who also appeared in person.

M. B. Pierce attorney for Genesee River Railroad Company (Erie).

Judson S. Rumsey attorney for The Pennsylvania Railroad Company.

C. D. Davie, Deputy Attorney General, for the State of New York.

By the Commission:

A careful review of the record in this case compels us to the conclusion that the proceeding must be dismissed for want of jurisdiction. We are unable to find that in respect of the matter complained of either of the respondent corporations is acting in violation of section 21 of the Railroad Law or in disregard of any other statutory obligation. Any obligation to the petitioner on the part of the respondents

or either of them is, as we believe, contractual, and accordingly beyond the power of the Commission to regulate or enforce. On the other hand, if the rights of the petitioner are being infringed by the State of New York, as suggested by the respondents, this Commission is of course without jurisdiction. So that under all aspects of the case the petition must be dismissed.

All concur.

Petition of T. S. ASHMEAD ET AL. for certificate of convenience and necessity for the operation of stage routes by auto busses in the city of Rochester.

Also Petition of GEORGE GRAUTMAN and seven others for similar certificates. [Case No. 5355.]

1. A certificate of convenience and necessity under chapter 667 of the laws of 1915 should not be issued if the Commission to whom application has been made believes that the ultimate effect of granting a certificate will be detrimental, rather than helpful, to the community affected. The Commission believes that the effect of granting the present application will be detrimental to the city of Rochester.

2. In the opinion of the Commission, electric street railway transportation has not by any means outlived its usefulness in large cities. No dependable form of transportation, good alike in Winter and Summer, has yet been devised to take its place. Care should be taken by the Commissions, in passing upon applications for certificates of convenience and necessity under chapter 667 of the laws of 1915, not to issue such certificates where the obvious or likely consequence of issuing them would be to arrest the further development of electric railways in a large and growing city. Except in cases where an existing street railway system obviously can not, or will not, supply the reasonable requirements of a community, the use of "jitneys" should be confined to streets and neighborhoods which have no electric railway readily available.

3. Without actually holding that under no circumstances will the use of cheap second-hand cars be countenanced by the Public Service Commission of the Second District as a regular means of transporting passengers for a low rate of fare in a great city, the Commission suggests that such cars should be employed in this way only in cases of extreme urgency. Suitable types of motor busses are available and on the market, and these — not automobiles built for private use — should ordinarily be made use of in urban transportation enterprises for which the consent of the Public Service Commission is asked.

4. Under chapter 667 of the laws of 1915 the Commissions, in passing upon applications of this character, have no right to be guided merely by a desire to establish the kind of transportation facilities which will cater to the widest range of individual tastes. They must look further

into the problem, and pass upon the effect of unrestricted jitney competition upon the ability of the existing street railway to maintain efficient service and to improve its facilities from time to time.

5. It must not be understood, however, that an established electric railway system in a large city shall under all circumstances be exempt from competition. Whenever it shall appear to the satisfaction of the Commission that an electric railway can not, or will not, solve a local transportation problem satisfactorily, the Commission will be prepared to give consideration to applications looking to the establishment of alternative methods of transportation, even though these involve direct competition with the electric railway.

Decided May 16, 1916.

Appearances:

Richard R. B. Powell, 349 Powers Building, Rochester, N. Y., for petitioners.

Harris, Beach, Harris and Matson, Rochester, N. Y., and *Walter N. Kernan*, Grand Central Terminal, New York, for New York State Railways.

William B. Fitzgerald, Troy, N. Y., for the Amalgamated Association of Electric Railway Employees; and *John J. O'Sullivan*, 33 Main street, Rochester, N. Y., for Division 282 of the Amalgamated Association of Electric Railway Employees, in opposition.

EMMET, Commissioner:

While the accompanying order indicates briefly the ground upon which we have felt it necessary to deny this application, it seems on the whole desirable that the somewhat formal recitals contained in the order itself should be supplemented by a fuller statement of the reasons which we regard as controlling in the matter.

Since the enactment of the Public Service Commissions Law of 1907, the State of New York has been committed to a somewhat different policy, in respect to competition between public utility companies, from the one which was once in force here. Previously it had not been deemed wise

to interfere, to any appreciable extent, with the natural workings of the competitive system in the public utility field. It had been supposed that by permitting and encouraging practically unrestricted competition between privately owned companies, the State was following the course from which the largest measure of good would accrue to the public at large. The passage of the Public Service Commissions Law definitely marked the end of that attitude upon the part of our state authorities. The new law vested in the Public Service Commissions power to withhold certificates of public convenience and necessity from persons or corporations who, subsequent to the passage of the act, might desire to enter certain public utility fields which were already occupied by established enterprises. The effect of this was to make it impossible for many willing competitors to engage in certain utility enterprises without first submitting to a tribunal representing the entire State the question whether the effect of the proposed competition might not, in the long run, be detrimental rather than beneficial to the public.

This change in policy was not actuated by any desire on the part of New York state to show favoritism to such persons or corporations as happened to be already interested in public utility enterprises at the time of the passage of the law. The far reaching regulatory powers of the new Commissions were expected to be effectively used in compelling existing utility enterprises to give the very best service that the circumstances of each case permitted. It was expected that the Commissions would insist upon it that the public should for the future receive a very much better quality of service than many of these utility companies had in the past been willing, without efficient regulation, to accord. The underlying thought was that in almost every case the ultimate sufferers from unrestrained competition between public utilities was, necessarily, the public itself. Experience had demonstrated that competing companies, operating in a single field, were never likely to achieve such secure financial standing as to enable them, collectively, to give

as good service as a single well regulated monopoly, which was kept up to the mark by efficient state regulation, would be in a position to supply. The safeguard, of course, in of the monopolistic idea — lay in the fact that, along with all such cases — the justification for this seeming approval the power to establish a virtual monopoly, the Commission was given the power to compel these monopolies to serve the public more faithfully than had generally been the practice before the passage of the law.

Since the Public Service Commissions Law has been on the statute books the Commissions have frequently exercised their new powers to protect existing utility companies against competition which if permitted would have been ruinous to both competitors. They have at the same time endeavored to exercise their regulatory powers to the fullest extent consistent with the other duty imposed upon them — the duty of permitting private capital invested in utility enterprises to earn a fair return upon the investment. On the whole, it may be said that the results have justified the hopes which were entertained for this new attitude on the part of the State toward competition between public utilities, and that the State has profited by its adoption.

Last year an unexpected situation arose in the business of urban passenger transportation. Large numbers of cheap or second-hand automobiles, mostly of the touring car type, appeared in nearly every city in the State as direct competitors of the existing street railroads. They carried passengers between points within the city for a five cent fare, over regularly designated routes — the same routes, in most cases, as were already being served by the street railways. The jurisdiction of the Public Service Commission did not, prior to 1915, extend far enough to cover this so called "jitney" method of transportation, yet the total volume of business which was at once taken away from the trolley roads was large enough to seriously menace many of these companies. Their losses were so considerable as in some cases to threaten solvency, and in nearly every case to raise the question,

seriously, whether in the future our street railways would be able to maintain that steady improvement in plant and service which the public expects of them.

It was this situation which led to the passage of chapter 667 of the laws of 1915. The jurisdiction of the Commission in respect to the issuance of certificates of public convenience and necessity was extended so as to require that every intending jitney operator should secure such a certificate from the Commission in whose jurisdiction his business was to be carried on, before he might lawfully engage in an operation of this sort. How much further than this the jurisdiction of the Commission over jitney operation was extended by the new law has not yet been fully determined. The law was hastily drawn, and the language employed is not perhaps as plain as it might be in some particulars. But that the responsibility of the Commission has been extended at least to the point of determining that in no case shall a certificate of convenience and necessity issue if the Commission to whom application has been made believes that the ultimate effect of granting the certificate will be detrimental rather than helpful to the community affected, there can be no doubt whatever.

The case of the present applicants has been presented by their attorney, Mr. Powell, with a clearness and ability which has impressed the Commission greatly. The conclusion to which we have finally come, however, is that the arguments advanced in support of the application are arguments which bear very much more strongly upon the question whether the general state policy of limiting competition in public utility fields is a desirable one, than they do upon the propriety of departing from that policy in this particular instance. The conditions which we have been considering in Rochester are, as a matter of fact, precisely those which led to the enactment of chapter 667 of the laws of 1915, and if it were ever expected that the Public Service Commissions should assert the power which the law gives them to limit competition under certain circumstances in an urban

transportation field, it seems to us that this case is a proper one for such an exercise of power.

Possibly this would have appeared more clearly if a single responsible company — instead of a number of individuals whose only bond in common is that they have been represented in this proceeding by a single attorney — had applied for leave to operate enough improved motor busses to take care of the same volume of business that the individually owned touring cars included in this application would be capable of handling, over streets substantially identical with those occupied by the street railway company. The granting of a certificate to such a competitor would at once be recognized, we suppose, by every thoughtful person as equivalent to a decision that the Commission saw nothing further to be gained by encouraging the further development of the electric railway system in Rochester. And since arrested development, in the case of any business enterprise, usually means slow death, such a decision could only be taken to mean that in our opinion the traffic needs of Rochester would best be served by a gradual replacement of the old, with the new, method of transportation. Now, as a matter of fact, the Commission believes nothing of the sort. Electric street railway transportation has by no means outlived its usefulness in cities like Rochester. On the contrary, we are of the opinion that the electric railway must for many years be regarded as the backbone of any dependable transportation system in such a city. To arrest the development of electric railways in Rochester would be to injure greatly the city's growth and future prospects. And the situation seems to us to be in nowise changed — assuming the volume of competition to be the same in either case — by the fact that the competition comes from individual, and perhaps in some cases irresponsible, owners of automobiles, instead of from a single well managed company. In either case the volume of competition contemplated by the present application would certainly be large enough to interfere seriously with any further immediate growth of

Rochester's electric railway system. And, in our opinion, no dependable form of transportation, good alike in Winter and in Summer, has yet been devised to take the place of what Rochester would lose if further development of its electric railways was to be discouraged and interfered with by the State.

What, then, is the proper function of the jitney? Our answer is that, except in cases where the existing street railway system obviously can not or will not supply the reasonable requirements of a community, the use of jitneys, for the present at least, ought to be confined to streets and neighborhoods which now have no electric railway readily available. Further than this, we seriously question, as a general proposition, the propriety of extending formal recognition at this time to automobiles of the touring car type as a suitable form of vehicle for carrying large numbers of passengers at a low rate of fare over regular urban routes. Automobiles built for private use were never designed for such purposes as it is proposed to put them to here. Such use can not be otherwise regarded than as unnatural and freakish. A suitable type of motor bus, admirably adopted for public uses, is now available and on the market. Without actually holding that under no circumstances will the use of cheap second-hand touring cars be countenanced by the Public Service Commission of the Second District as a regular means of transporting passengers for a low rate of fare in a great city like Rochester, we feel that we ought at this time at least suggest that only in cases of extreme urgency should such cars be employed in this way. Certainly we have not been impressed with the belief that any such urgency exists in Rochester at the present time. Improvements should be made in the transportation system there, as our order indicates, but this is not the way to make them.

We realize, of course, that in every large city people will be found who would enjoy making occasional use of the jitneys, and so far as our present order interferes with the pleasure of these people, we regret being compelled to make

it. The problem before us would of course be a very simple one if we were not required to give any particular consideration to the effect of unrestricted jitney competition upon the general problem of transporting passengers in a large city — if all we had to do was to assist in establishing transportation facilities which would cater to the widest range of individual tastes. But if that was intended to be our only function, it must be perfectly obvious to everybody that chapter 667 of the laws of 1915 would never have been placed upon the statute books at all. The present policy of the State with regard to this matter is plain, and it is our duty to carry out this purpose until the law under which we are acting is repealed. This would be our duty even if, as individuals, we disapproved of the purposes of the present law. As a matter of fact, we approve of it, and regard it as absolutely essential, from the standpoint of securing dependable transportation facilities in our larger cities, that the law should be enforced in such a case as this.

It should be understood, however, that this Commission is by no means of the opinion that a corporation like the New York State Railways should never, under any conceivable circumstances, be subjected to competition from other groups of investors who are willing in a businesslike way to risk their money in supplying better transportation facilities to the people of Rochester. A situation may yet arise which will require the bars to be let down, and the railway to be left to struggle for existence without further state protection against wasteful competition. Protection is being extended to it now because we feel that, on the whole, the existing street railway system of Rochester — viewed not as a mere money-making machine operated for the benefit of its stockholders but as a public agency — is distinctly worth saving in the interest of the people of Rochester. It has performed very valuable services in the upbuilding of Rochester, and seems now to be in a position where, with the help of the State instead of its hostility, it will be able to solve the Rochester transportation problem

satisfactorily. A further effort should be made to get the very best results possible out of such a system before condemning it as outworn or contributing toward its eventual undoing. If that effort fails, we will, as our order states, be prepared to give further consideration to alternative methods of supplying Rochester with a proper transportation system.

In reaching this conclusion we have acted in strict accord with what we understand to be the purpose of the statute from which our powers have been derived, and we hope that our decision will, on the whole, be approved by the thoughtful citizens of Rochester.

All concur.

In the Matter of the Complaint of THE WOODRUFF HOTEL COMPANY of Watertown *against* NEW YORK TELEPHONE COMPANY as to connecting thirty additional telephone instruments to the private exchange in the New Woodruff Hotel in Watertown, and as to rates. [Case No. 2830.]

1. While a telephone company will not be required to connect its wires with switchboards and instruments installed and owned by the subscriber, it will not be permitted arbitrarily to discontinue existing service through privately owned instrumentalities which were installed at the invitation and under the requirement of the telephone company, under its supervision and not shown to have become inefficient or to depart in any way from the standard equipment in use by the company.

2. A tariff rate is not shown to be unjust or unreasonable by evidence that it is greatly higher than a former rate established under competitive conditions and before the law subjected telephone corporations to public regulation.

3. A hotel private branch exchange rate is not shown to be unreasonable by evidence that the patrons of the hotel refuse to pay tolls on local calls and that the hotel bears the burden of such calls rather than lose its patronage.

4. A hotel private branch exchange provides economies in the way of interior service and should not be expected to yield to the hotel revenues sufficient to carry its cost.

5. Where a hotel had installed a telephone system at its own expense by invitation and under supervision of the telephone company, under a special contract made before the law subjected telephone corporations to regulation by the Commission, it was held that a proper tariff for future service should be the regular tariff less a sum equivalent to interest on the present value of the system plus a suitable allowance for depreciation.

Decided June 6, 1916.

Appearances:

Messrs. Pitcher & O'Brien, Watertown, for complainants.

Mr. R. V. Marye, 50 Church street, New York city, for the respondent.

IRVINE, *Commissioner*:

The Woodruff Hotel Company is a domestic corporation conducting a hotel in the city of Watertown known as the New Woodruff. The building is owned by Nellie C. Taylor. In 1906 general repairs and improvements were made on the building, and the owner at that time caused to be installed a telephone system embracing all that was required for what is known as a hotel private branch exchange, together with two booths in a corridor adjoining the lobby. This was done in pursuance of a contract with the Central New York Telephone and Telegraph Company, the property, business, rights, and obligations whereof have since been taken over by the New York Telephone Company. Under this contract the Central New York Telephone and Telegraph Company supplied the material and performed the labor of installing the system, but the owner of the building paid the telephone company for everything except the switchboard, ringing circuit, trunk lines, transmitters, and receivers. This contract contemplated one hundred telephone sub-stations in the various rooms, and that number or approximately that number were installed. In the same year an additional booth was installed by the Citizens Telephone Company, of which the New York Telephone Company is also the successor. In 1911 an addition was built to the hotel, and the New York Telephone Company installed twenty-six more stations in this addition with the necessary wiring. The owner paid for the additional installation. Under the original contract the Central New York Telephone and Telegraph Company was to receive from The Woodruff Hotel Company for service and maintenance \$285 per annum plus tolls on messages to points other than Watertown. Subsequently, two additional trunks were added at the additional cost to the hotel company of \$24 per year each.

The service having been rendered under this contract for several years, first by the Central New York Telephone and Telegraph Company and later by the New York Telephone

Company, the latter declined to furnish further service except at its regular tariff rates for hotel private branch exchanges, and then not unless it should be vested with absolute ownership as well as control of the entire system and instrumentalities. It offered to pay, in order to secure title to that part of the system privately owned, \$474; but the owner of the building refused to sell. The hotel company by this proceeding seeks to compel continued service by means of the privately owned instrumentalities, asserts that the tariff proposed is unreasonable, and asks that the Commission determine what tariff is reasonable in the premises. It will be observed that the original contract was made several years prior to the act of 1910 whereby telephone companies were subjected to regulation under supervision of the Commission.

The Commission has held that a telephone company will not be required to connect its wires with switchboards and instruments installed and owned by the subscriber. (In the matter of the application of the *State Agricultural and Industrial School v. New York Telephone Company*, IV P. S. C., 2nd D., p. 219). The Commission deems the reasons for that decision well grounded in public policy, and that the rule therein established is essential to the most efficient and responsible telephone service. This, however, is not a case where the complainant is endeavoring to compel a telephone company to connect its service with a privately owned and installed system. It is a case where the complainant is resisting an effort on the part of the telephone company to discontinue a service which has been rendered for years in pursuance of a contract with the company's predecessor requiring the subscriber to provide the greater part of the equipment. It is one thing to require a telephone company to enter upon the furnishing of service by means of privately owned and controlled equipment, and quite a different thing to prevent it from discontinuing service by means of such equipment when such equipment was installed by invitation or requirement of the company or by a prede-

cessor whose obligations the company has assumed. Moreover, the actual installation and the selection of the equipment was by the telephone company itself. There has not been and apparently is not now any claim that it is inefficient or that it departs in any way from the standard equipment now used by the company. Furthermore, the complainant offers to give the company complete control over the equipment subject only to such supervision as may be necessary in order to prevent the structural impairment of the hotel building. The hotel company which seeks the service is not the owner of the building or of the equipment. It can not sell the equipment and the owner will not so do. Under all the circumstances, without infringing in any degree the principles laid down in the Industry case *supra*, the Commission believes that it is unjust and unreasonable for the telephone company to refuse service except under conditions of absolute ownership.

This being determined, there remains to consider the rate to be charged for the service to be rendered. The evidence falls far short of showing that the existing hotel private branch exchange tariffs of the telephone company are unreasonable. The proof offered on this subject is directed almost entirely to two points: one is that the rates now demanded are very much higher than the original contract rate; the other is that the rates now demanded include a toll charge of five cents for each outgoing message to points in the Watertown area and for the collection of which the hotel company is to receive a commission of one cent, and that this toll charge is unjust. A sufficient answer to the first point is that the disparity between the old and new rates no more tends to show that the new rate is abnormally high than that the old rate was abnormally low. As a matter of fact, the old rate established under former competitive conditions without safeguards against discrimination appears to the Commission to have been abnormally low. There is no basis in this record for a finding that the general hotel private branch exchange tariffs are excessive, and in demanding

payment in accordance with such tariffs the telephone company is only performing its duty. As to the second point, the chief objection urged was that patrons of the hotel refused to pay tolls on their local messages, and that the hotel company in the circumstances preferred to bear the expense itself rather than lose the patrons. This practice resulted in local calls made by patrons from rooms becoming a serious burden rather than a source of revenue. In the past, hotel keepers may have experienced such difficulties. Under present conditions, patrons of hotels of all classes, it is believed, expect to pay tolls for the use of room telephones. If such tolls are not collected, the hotel company rather than the telephone company should bear the loss.

In connection with the rates it must not be forgotten that a private branch exchange in a hotel furnishes a valuable interior service, and besides indirect economies avoids the direct expense of an annunciator system and of numerous messengers. It should not be expected to cost nothing.

It follows that the rate at which service should be rendered must be based upon the regular tariff rates of the company for similar service. The fact remains, however, that the service is to be performed through an installation normally paid for by the telephone company but paid for in this case in large part by or for the benefit of the subscriber. Calculations based on the evidence indicate that the original cost of the private installation was a trifle less than \$1100. The greater part of this installation has been in use since 1906, and during that time the subscriber has had the benefit thereof in the way of greatly reduced rates. Its depreciated value at the present time is assumed to be about \$500. As before stated, the telephone company has offered to pay \$474 therefor. In order to make the necessary adjustment for the purpose of avoiding the discrimination which would result from the imposition of the entire tariff rate, it seems proper that the present value of the hotel owner's instrumentalities be fixed at \$500, and that the complainant be allowed 6 per cent interest on that sum plus

\$100 per annum for depreciation; so that under the particular conditions stated, a proper and reasonable rate for the service will be the regular hotel private branch exchange tariff from time to time applicable less \$130 per annum; but this provision should not remain effective beyond the period of five years.

All concur.

In the Matter of Proposed New Passenger Fares by Various
Common Carriers Subject to the Jurisdiction of this
Commission. [Case No. 5345.]

The New York Central Railroad Company filed with the Commission, to take effect January 1, 1916, certain tariffs having the effect of establishing a substantially uniform passenger rate of two and a-half cents per mile throughout the State except for way passengers between Albany and Buffalo where the statute of 1853 fixed the fare at two cents per mile. These new tariffs generally operated to increase the existing rates, in a few instances to decrease them. New round-trip rates were also fixed, based on the one-way rate of two and a-half cents per mile. Complaints having been made to the Commission, the new tariffs were suspended and investigation undertaken.

1. In this case there was no contention that the company failed to earn a fair return on its investment as a whole but only that its intrastate passenger business did not yield a proper proportionate return. (*Five Per Cent Rate Case*, 31 I. C. C. 351; *Western Rate Advance Case*, 35 I. C. C. 497; *Norfolk & Western Ry. Co. vs. Conley*, 236 U. S. 604; *Northern Pacific Ry. Co. vs. North Dakota*, 236 U. S. 585; distinguished on this ground.)

2. No valuation of the company's property was submitted by the company or attempted by the Commission, the company presenting the case upon the theory that its intrastate passenger revenue was less than its intrastate passenger expenses.

3. To ascertain a reasonable intrastate passenger rate the entire passenger traffic, interstate as well as intrastate, should be considered. It was found that the earnings from interstate passenger business had been approximately fifty per cent of those from intrastate passengers.

4. It was found that while the passenger business of the company has been gradually increasing the average rate per passenger per mile has been decreasing because of a pronounced increase in commutation passengers at commutation rates not affected by the proposed tariffs.

5. In apportioning operating expenses between passenger and freight service, the railroad pursued the method adopted by the Interstate Commerce Commission in the *Western Passenger Rate case* and the Commission accepted that method as sufficient for the present case.

6. In apportioning operating expenses between interstate and intrastate traffic the Commission refused to base the apportionment on the ratio between intrastate passengers and interstate passengers (6.4 per

cent interstate), but apportioned such costs upon the ratio between intrastate and interstate passenger miles. (In 1910, 29.9 per cent interstate; and in 1915, 31.3 per cent interstate.)

7. Apportioning passenger operating expenses by the method set forth in the opinion it was found that the company is earning a fair return on its entire intrastate passenger traffic but that it is probably not earning a fair return on its intrastate passenger traffic on any of the divisions affected by the tariffs in question except the Hudson division from Albany to New York and perhaps the Harlem division.

8. Where a large railroad system is made up of many underlying companies formerly operated independently and the system is now split into divisions, some of which are unprofitable, the divisions which are profitable can not be made to bear the cost of transporting passengers on the unprofitable divisions to the full extent of such losses. Emmet, Commissioner, dissenting.

9. The Commission can not approve increased fares merely for the purpose of making the rates of all carriers equal. To justify approval of such increases there must be established the necessity of additional revenue in order to earn a fair return. Emmet, Commissioner, dissenting.

10. Chapter 216 of the Laws of 1846, incorporating the Hudson River Railroad Company and limiting passenger fares between New York and Albany to two cents a mile, except in winter months, while not expressly repealed, was repealed by implication by the General Railroad Act of 1850 (*Johnson vs. Hudson R. R. Co.*, 49 N. Y. 455).

11. While The New York Central Railroad Company clearly failed to show that the proposed increases on its Hudson division were justified, and while it seems that some increases on certain other divisions might be justified, all the proposed tariffs were ordered canceled in order that the company might work out new tariffs consistent with the conclusions reached and eliminating certain discriminations discovered in the course of the investigation. Emmet, Commissioner, dissenting.

12. Among the tariffs under suspension were tariffs filed by The Delaware and Hudson Company and The New York Central Railroad Company for passenger service between the cities of Albany and Troy, fixing a rate of fifteen cents instead of ten cents, the existing rate. These companies operate jointly a "belt line" service between the two cities, The New York Central Railroad Company owning the tracks on the east side of the Hudson river and The Delaware and Hudson Company those on the west side. While it was apparent that the cost per train-mile of operating the belt line trains is more than the

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revenue per train-mile derived therefrom, there was no evidence as to the revenues and expenses of other traffic over the same tracks, and in the absence of such evidence it was held that the railroads had failed to sustain the burden of showing the justness of the proposed increase.

Decided June 8, 1916.

Appearances:

C. C. Paulding, Jacob Aronson, and Visscher, Whalen & Austin (by Mr. Austin) for The New York Central Railroad Company.

John E. MacLean and H. T. Newcomb for The Delaware and Hudson Company.

M. B. Pierce for Erie Railroad Company.

Stewart C. Pratt for Lehigh Valley Railroad Company.

C. L. Andrus for New York, Ontario and Western Railway Company.

H. G. Curtis for Hudson Navigation Company.

Samuel Untermeyer for complainants.

Louis Marshall for Mayors' Conference.

Benjamin Fagan for Village of Ossining.

John B. Corwin for City of Newburgh.

Samuel J. Rosensohn representing John P. Mitchel, Mayor of the City of New York.

Palmer Canfield, jr., representing the Mayor of Kingston.

Walter E. Ward for the Civic League of Albany.

Joseph B. Mulholland for Alice M. Brady and others.

Julius Illch for the Albany Chamber of Commerce.

L. D. C. Woodward for the Watervliet Chamber of Commerce.

Nathaniel B. Spalding for the New York State Tax and Transportation Reform Association.

R. A. DeFreest for Albany Council Commercial Travelers.

Albert E. Davis for United Commercial Travelers of America.

M. W. Van Auken for Commercial Travelers Mutual Accident Association of America.

George R. Lunn for City of Schenectady.

Homer Eckerson, Mayor of Mechanicville in person.

Thomas J. Shuman for Village of Haverstraw.

F. E. Moyer for City of Johnstown.

Eben H. P. Squire for City of White Plains.

William E. Fitzsimmons for special committee Albany Chamber of Commerce.

Cornelius F. Burns, Mayor of City of Troy in person.

W. W. Teeling for Rensselaer Board of Trade.

C. S. Davison for Village of Tarrytown.

James T. Lennon, Mayor of Yonkers in person.

Joseph F. O'Brien, representing Mayor James T. Lennon of Yonkers.

Max Cohen, *Frank A. Bennett*, and *Joseph S. Wood* for Cities of Mount Vernon and Yonkers.

Frank H. Deal for Village of Green Island.

CARR, Commissioner:

This is a case involving increases in fare on certain lines of The New York Central Railroad Company in the State of New York. These proposed increases were set forth in twenty-nine tariffs and supplements which were filed with the Commission to take effect January 1, 1916, on statutory notice. Immediately after these tariffs were filed, numerous complaints were filed with the Commission protesting against the increase. It was thought by the Commission that the more satisfactory way of dealing with the matter would be for it to institute an investigation on its own behalf, and it acted accordingly. It was considered that under this method all the complainants would have ample opportunity to be heard. The first hearing was held in the city of Albany on February 15, 1916, and after five more hearings the case was closed April 21, 1916. Pending the investigation, the tariffs were suspended until April 29, 1916; on April 25, 1916, they were suspended until June 1,

1916; and on May 25, 1916, they were again suspended to July 1, 1916. Some of the tariffs which are the subject of this investigation were also filed with the Interstate Commerce Commission but they were not suspended by that body. Practically all of the trunk lines operating in the State of New York east of Buffalo filed tariffs with the Interstate Commerce Commission at the same time.

In 1914 there were ten operating divisions of the New York Central and Hudson River railroad, as follows: Western division, Buffalo to Syracuse; Mohawk division, Syracuse to Albany; Hudson division, Albany to New York; Harlem division, New York to Chatham; Putnam division, New York, 155th St., to Brewster; River division, Weehawken to Ravena; Pennsylvania division, Williamsport to Lyons; Ontario and St. Lawrence division, Syracuse to Massena Springs and Syracuse to Suspension Bridge; Adirondack division, Utica to Malone; Rochester division, Rochester to Buffalo and Niagara Falls (part of the R., W. & O.).

Single fares on various divisions are as follows: Western division, 2 cents per mile; Mohawk division, 2 cents per mile; Hudson division, outside of New York city, 2.17 cents per mile; Harlem division, outside of New York city, 2 to 2½ cents per mile; Putnam division, from 2 cents to 3 cents per mile (these variations are due in some cases to trolley competition); River division, from 2.17 cents to 3 cents per mile; Pennsylvania division, south of Corning, 2½ cents per mile; Pennsylvania division, north of Corning, 2 cents per mile; Ontario and St. Lawrence division, uniformly 2½ cents per mile except between Wallington and Suspension Bridge where they are 2 cents per mile, and between Syracuse and Suspension Bridge 2 cents per mile; St. Lawrence and Adirondack division, 2½ cents per mile; Rochester division, 2 cents per mile; Batavia and Canandaigua branch, 2½ cents per mile; Batavia and North Tonawanda branch, 2¼ cents per mile.

The fare for way passengers on the main line of the New York Central railroad between Albany and Buffalo was fixed at 2 cents per mile by the provisions of chapter 76 of the laws of 1853, pursuant to which the corporation was created.

Fares on the Hudson division and the River division were increased in 1909 from 2 to 2.17 cents per mile. Some increases in commutation and family tickets were made in 1907 and 1910.

The increases in rates in the tariffs under suspension cover one-way and round-trip tickets; no other fares are affected. The principal changes are on the Hudson, Harlem, and River divisions, covering practically the territory south of Albany, and such territory beyond that as would be affected by a fare to that territory. These tariffs also provide for some decreases in existing rates. The effect of the proposed change in the one-way rate is to make the fare substantially uniform throughout the State at $2\frac{1}{2}$ cents per mile except where the fare for way passengers has been fixed at 2 cents per mile by statute. The maximum decrease anywhere on the system is half a cent a mile: this would occur where a rate of 3 cents was in effect at the time this application was made. In some cases $2\frac{3}{4}$ cents per mile is charged, and that would be reduced to $2\frac{1}{2}$ cents. The round-trip fares in the commutation territory, which is a 40-mile zone out of New York city, were left undisturbed at 2 cents a mile. The limits of that commutation zone are Peekskill on the Hudson division, Katonah on the Harlem division, Yorktown Heights on the Putnam division, and Jones Point on the West Shore. The round-trip fares beyond that 40-mile zone are constructed on the basis of $2\frac{1}{2}$ cents per mile, and fares from and to points within that zone, outside of the 40-mile limit, are constructed on the basis of the fare in effect within the 40-mile zone and $2\frac{1}{2}$ cents per mile beyond.

The Lackawanna, Lehigh Valley, and Erie construct their single fares on the $2\frac{1}{2}$ cent per mile basis, and The Delaware

and Hudson Company on a 3 cent per mile basis. The basis generally in Pennsylvania and New England territory is $2\frac{1}{2}$ cents per mile. At the time of the filing of the new tariffs by the New York Central, its fares in the State of New York averaged about 2.2 cents per mile.

The interstate fares now in effect over all the lines in the State of New York are on a basis of approximately $2\frac{1}{2}$ cents per mile, pursuant to tariffs which have been filed, so that the interstate rate on the New York Central in the State is higher than the intrastate rate. As a result, the Central is carrying passengers in the State of New York for less than other roads competing with it at certain points in the State, due to the fact that their passengers are interstate passengers while those on the Central are intrastate. This situation, however, has only existed since January 1, 1916, when the tariffs filed with the Interstate Commerce Commission became effective. On the other hand, however, some of these roads, even with increased fares and greater mileage to points competing with the Central, are carrying passengers from New York city to these points at a lower rate per mile than the Central. There has been no apparent increase in the passenger business on the Central due to the interstate rate charged by the competing roads, nor has any increase in its service been required because of the fact that its intrastate rates to competing points are less than the interstate rates charged by the other carriers.

The one-way fare of \$9.25 from New York to Buffalo is not disturbed under the proposed increases. The differential fare is \$8. This applies to the Lackawanna, West Shore, Lehigh Valley, and the Erie. The differential rate is not affected in any case on any of the lines. This differential is the advantage given to the so called weaker lines from a traffic standpoint so they may get an equitable share of the business.

In 1910 the total mileage of the line east of Buffalo, which includes the Pennsylvania division, the St. Lawrence and

Adirondack, and the Ottawa and New York, was 3268.72 miles; and the lines exclusively in New York state other than the Boston and Albany, St. Lawrence and Adirondack, and Ottawa and New York, aggregated 2603.45 miles. The Pennsylvania division outside of the State of New York comprises about 600 miles. The total miles of the Central in the State in the year 1914 was 2643.92.

The total operating revenue from passenger service from the line east of Buffalo includes revenue from the Pennsylvania division and that portion of the River division in New Jersey. The total operating revenue from intrastate passengers in New York does not include the revenue from the lines in Pennsylvania and New Jersey.

The population per mile of road in New York and adjacent States is as follows: New York, 1141; Connecticut, 1181; New Jersey, 1190; Massachusetts, 1666; Rhode Island, 2847; Pennsylvania, 705. Density of traffic is an important consideration in passenger traffic so far as earnings are concerned.

The report of The New York Central and Hudson River Railroad Company to the Public Service Commission, Second District, for the year ended June 30, 1914, gave the average number of passengers per mile as 74. Mr. Vosburgh, the general passenger agent of the New York Central, testified on behalf of the railroad that his records showed 17 passenger-miles per car-mile.

The following schedule shows the number of trains operated on the line east of Buffalo in the last six years:

	1910	1911	1912	1913	1914	1915
Local.....	896	885	880	923	858	875
Through.....	136	133	135	136	130	120

On the Hudson division, a train from New York to a point beyond Albany is classed as a through train. On the Harlem division, a through train is one from New York to a point beyond Chatham. On the River division, a through train is one from New York to a point beyond Ravena. Eastbound trains are figured on the same basis.

Orleans county is the only county in the State of New York served exclusively by the New York Central railroad.

The following cities in the State of New York are served by railroads other than the New York Central, as follows: Buffalo 10, Rochester 4, Syracuse 3, Albany 1, New York city 11.

The following figures give some idea of the traffic on other roads out of New York city:

<i>New York city to</i>	<i>Number of miles</i>	<i>Passengers per month</i>	<i>Single trip per mile</i>	<i>Round trip per mile</i>
Philadelphia, Penna.....	90	100,000	\$.025	\$.025
Boston, Mass.....	230	81,000	.025	.....
New Haven, Conn.....	73	39,000	.025	.....
Springfield, Mass.....	135	12,000	.025	.....
Albany, N. Y.....	143	13,500	.0217	.02

¹ This does not take into account tickets for points west or north of Albany, nor interstate tickets, nor passengers using mileage books between New York and Albany.

The service performed by the New York Central upon its lines is substantially the same and equally as good as that given by other lines which operate out of New York city and which were used in comparing fares on those lines with fares on the New York Central.

There are only two trains on the New York Central that handle interstate passengers exclusively: these are the Twentieth Century Limited east- and westbound trains. The average number of passengers on the Twentieth Century is about 74 per day.

The trains that run in sections are usually long distance trains like the Twentieth Century, Lake Shore Limited, and the Wolverine. These are heavy Pullman trains. Some of the trains on the Hudson division occasionally run in sections, particularly during the summer season.

No portion of the interline tickets is apportioned to intrastate business. The interline tickets are those sold for transportation from a point within the State to a point without the State, and *vice versa*. The account is kept in that way for taxation purposes because the earnings of the company within the State are taxed.

The interstate traffic uses the 2600 miles of track in New York east of Buffalo.

The earnings on various eastern railroads per passenger-train mile for the year ended June 30, 1914, were as follows:

Lake Shore and Michigan Southern.....	\$1.77
Pennsylvania.....	1.60
Pennsylvania Company.....	1.39
Erie.....	1.35
Lehigh Valley.....	1.15
Central Railroad of New Jersey.....	1.29
Delaware and Hudson.....	1.28
Long Island.....	1.60
New York, Chicago and St. Louis.....	1.54
Buffalo, Rochester and Pittsburgh.....	.97
New York, Ontario and Western.....	1.11

These figures are taken from the report published by the Interstate Commerce Commission.

The accounts of the consolidated company, The New York Central Railroad Company, began January 1, 1915. Since that time the accounts have not been kept by state lines. The accounts of the New York Central and the constituent companies have never been kept by state lines because this was not required by the Interstate Commerce Commission.

The revenues reported to the Public Service Commission by The New York Central Railroad Company for the year 1915 for freight and passenger traffic are as follows:

	<i>Total operating revenue</i>	<i>Operating expense</i>	<i>Net</i>
1915			
First quarter.....	\$39,012,342	\$29,794,426	\$9,217,916
Second quarter.....	44,660,147	28,725,146	15,935,001
Third quarter.....	48,304,589	29,820,979	18,483,610
Fourth quarter.....	52,953,405	32,538,906	20,414,499
	\$184,930,483	\$120,879,457	\$64,051,026
	<i>Total rev., inc. non-op. rev.</i>	<i>Opfg. exp., inc. fix. chgs.</i>	<i>Net income</i>
1915			
First quarter.....	\$42,871,035	\$43,072,098	\$201,043
Second quarter.....	49,166,910	42,153,792	7,013,118
Third quarter.....	52,402,182	43,407,226	8,994,956
Fourth quarter.....	57,278,358	45,373,895	11,904,463
	\$201,718,485	\$174,007,011	\$27,711,474

The 1915 net income which remained after paying all fixed charges, taxes, etc., was equal to 11.11 per cent upon the outstanding stock of The New York Central Railroad

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Company, amounting to \$249,590,460. The earnings during the last quarter of 1915 were equal to about 4.6 per cent upon the stock of the company. Dividends have been paid on the stock of The New York Central and Hudson River Railroad Company since 1875, as follows:

1876-1884.....	8 %	1899.....	4 1/2 %
1885.....	5 %	1900-1905.....	5 %
1886-1888.....	4 %	1906.....	5 1/2 %
1889-1890.....	4 1/2 %	1907.....	6 %
1891-1893.....	5 %	1908-1909.....	5 %
1894.....	4 1/2 %	1910.....	6 %
1895-1898.....	4 %	1911-1913.....	5 %
		1914.....	5 %

Counsel for the railroad company at the first hearing made the following statement in opening his case:

This investigation, if the Commission please, is into the proposed increase by the New York Central and other railroad companies of their single-trip rates and round-trip rates in certain territory in the State of New York. The New York Central, of course, as being the largest road in the State and having the largest interest, will, I assume, be expected to bear the brunt of the matter.

We have not proposed, in the preparation of our case, and we do not propose in the presentation of it, to go into the question of valuation or of interest charges or fixed charges of any character. We simply intend to confine ourselves to the intrastate passenger revenues and the intrastate passenger expenses and the value of the service. To that end we will present our testimony, and we hope to be finished very shortly. Our reason for not going into the valuation question is, first, that it would be embarrassing at this time when the Interstate Commerce Commission is conducting a valuation of all the railroads of the country; and second, that it is unnecessary, as our intrastate passenger revenue is less than our intrastate costs and of course it follows that if we are entitled to a reasonable return upon our investment and we do not obtain from the service enough of a return to pay the expenses then it is unnecessary to go into the return on the investment.

From our point of view the question involved here is one of fact and not of law, and we have so dealt with it. It might well be that we could properly decide the case on the earnings of the road for 1915 alone, since they so conclusively show that the company is earning a substantial return,

at least upon its outstanding securities if not on the actual value of the property. However, in order that we may present the matter more at length we have concluded to discuss the facts in some detail as we think this is due the interested parties. For the reason here stated, we shall not attempt to deal with the numerous legal propositions which are discussed at considerable length in the briefs submitted by counsel.

The complainants strenuously opposed the action of the railroad in determining its operating costs by the same method as that adopted by the Interstate Commerce Commission in the Western Passenger Rate case, but the brief of counsel accepts the percentages used by Witness Gardner for the railroad in making his computations so it will be unnecessary to discuss other theories as to the operating expenses which were presented by counsel at the various hearings.

The case has presented considerable difficulty to the Commission for the reason that evidence was prepared and submitted on the theory that no valuation of the property was required in order to reach a determination as to whether or not the company was entitled to increase its fares in the manner set forth in the tariffs which are under suspension. It is undoubtedly true that many cases may be presented which on their face indicate that an increase would be justified, yet it has come to be a well accepted theory that in order to determine what are fair and reasonable rates the regulating body must be in possession of facts so that it can determine whether or not the company is earning a fair return upon the value of the property used in the public service. No valuation was furnished in this case for the reasons heretofore mentioned, so that the Commission is obliged to deal with the situation entirely upon the record as it stands. Whether our determination would be any different if we knew the value of the company's property it is impossible for us to state.

The railroad company proceeded upon the theory that it

was only necessary to show that the earnings from intrastate fares were not sufficient to pay operating expenses, giving no consideration to the question of interstate passengers carried in the State of New York. In the course of the investigation, however, it developed that the earnings in the State of New York from interstate passengers were approximately 50 per cent of those for intrastate passengers, and that these interstate passengers traveled over some portion of the road from New York city to Buffalo. How many of them traveled this entire distance we are not advised, but it is a well known fact that every person traveling over the New York Central railroad from New York city to points outside of the State of New York west of Buffalo passes over the main line of the New York Central from New York city to Buffalo, a distance of 440 miles. To say that this traffic is not to be taken into consideration in determining what is a reasonable rate of fare in the State of New York is a conclusion which this Commission is unable to accept.

Objection was made by counsel for the railroad company to furnishing figures showing interstate revenue which was earned on the line east of Buffalo, but they were supplied at the request of the Commission.

We believe that all passenger traffic over the lines of the company in the State of New York should be taken into consideration in determining the rate per mile to be charged to passengers.

Following a suggestion in the Western Passenger Rate case, the New York Central endeavored to segregate its intrastate costs from the interstate costs, but this in our opinion would not enable us to work out the matter satisfactorily. It was determined by the Interstate Commerce Commission in the case mentioned that the interstate and intrastate passenger business of the carriers was so intermingled that the matter could be more satisfactorily dealt with as a whole, and we have come to the same conclusion here.

It should be borne in mind that all of the figures that were presented to the Commission relating to interstate as well as intrastate revenue in the State of New York were made upon the basis of the existing fares in the State: and that these fares on the main line from New York to Buffalo are at the rate of 2.17 cents per mile from New York to Albany, a distance of 143 miles; and 2 cents per mile from Albany to Buffalo, a distance of 297 miles.

We are here confronted with a situation which is entirely different from the one out of which the Western Passenger Rate case developed. That case was one which related to fare increases made by certain western roads following the determinations of the Interstate Commerce Commission in the *Five Per Cent Rate Case*, 31 I. C. C. 351; and the 1915 *Western Rate Advance Case*, 35 I. C. C. 497; and recent decisions of the Supreme Court of the United States. There the carriers were claiming that their earnings from freight and passenger business were insufficient to give them a fair return on their investment. There is no such situation before this Commission, for it is not claimed that The New York Central Railroad Company is failing to earn a fair return on its investment as a whole, but rather that it is entitled to higher rates on its intrastate passenger business because that business is not earning a fair return taken as a whole. As a matter of fact, the evidence here is to the effect that the road, after paying all its fixed charges, including taxes and rentals, earned 11.11 per cent on its capital stock for the year 1915.

The railroad urges the proposed increases not so much from the revenue standpoint as it does on the ground of being permitted to equalize its rates so they will correspond with the rates now exacted by other carriers which reach points in the State of New York in competition with the New York Central. To substantiate this, we quote the following paragraph from page 16 of the brief submitted by the counsel for the railroad company:

While we do not, of course, urge the disparity between passenger rates on the New York Central and those on the other trunk lines as conclusive of the proposition that the rates of the New York Central are too low, we do submit that the difference, in some cases decidedly substantial, between the rates on the other lines and those on the New York Central should be recognized by the Commission as of persuasive evidence tending to the conclusion that the New York Central should be permitted to equalize its rates to the extent now sought, namely to a $2\frac{1}{2}$ cent basis.

In support of this claim the brief quotes from *L. & N. R. R. Co. vs. U. S.*, 238 U. S. 1, and the accompanying figures (Table I) were read into the record to show the disparity between the fares charged on the New York Central and the other roads running out of New York city.

We do not understand that it is our province to approve increased fares merely for the purpose of making the rates of all carriers equal or substantially uniform even. To justify approval of the proposed increases there must be established the necessity for additional revenue in order to enable the company to earn a fair return upon its investment.

We are not unmindful of the decisions of the Interstate Commerce Commission nor of the reasoning set forth in *Norfolk & Western Ry. Co. vs. Conley*, 236 U. S. 604, and *Northern Pacific Ry. Co. vs. North Dakota*, 236 U. S. 585. These cases can readily be distinguished from the present one because they rest upon an entirely different foundation. In each of them a State attempted to fix rates which the companies claimed prevented them from earning a fair return upon their investment and that the rates were in effect confiscatory; while in the Western Passenger Rate case the claim was made that taking the returns from both freight and passenger traffic combined, the companies were not earning a fair return on their investment, and for that reason additional increases in passenger fares were justified. Here we are met with a situation where the only real contention for the increased rates is the claim that the Interstate Com-



1914, AND 1915.

Year	1914			1915		
	Number of passenger car-miles run during year	Passenger revenue		Number of passenger car-miles run during year	Passenger revenue	
		Total	Average per car-mile		Total	Average per car-mile
	<i>Miles</i>	<i>Dollars</i>	<i>Dollars</i>	<i>Miles</i>	<i>Dollars</i>	<i>Dollars</i>
5	508,715	149,837	29.45	503,988	142,163	28.20
8	508,764	232,353	45.67	509,476	228,365	44.82
4	779,228	216,360	27.76	765,139	221,111	28.90
9	355,949	84,526	23.75	360,627	89,133	24.72
5	415,708	122,158	29.38	417,036	120,400	28.87
5	367,610	90,273	24.56	377,128	92,046	24.41
7	.....	.....	.....	.....	.....	.....
1	243,306	57,732	23.73	249,645	59,394	23.79
6	.....	.....	.....	.....	.....	.....
9	.....	.....	.....	.....	.....	.....
1	1,274,695	305,885	23.81	1,180,372	276,501	23.42
3	168,157	32,278	19.20	167,358	28,747	17.18
0	845,166	184,723	21.86	807,020	174,054	21.54
5	673,642	137,079	20.35	662,372	129,132	19.49
6	212,651	31,086	14.62	213,058	28,872	13.55
8	115,059	17,121	14.88	115,924	18,146	15.65
0	479,908	110,496	23.02	473,869	105,737	22.31
3	108,812	23,633	21.72	114,057	24,160	21.18
4	202,615	29,579	14.60	202,632	24,427	12.05
5	84,501	19,661	23.27	92,650	20,871	22.53
3	318,124	79,537	25.69	314,994	77,770	24.69
5	354,739	84,874	26.68	322,132	81,919	25.43
5	309,649	102,190	33.03	304,900	96,706	31.72
6	309,437	119,825	33.78	347,155	112,521	32.41
6	134,760	25,449	18.89	137,294	26,904	19.59
7	327,790	88,645	27.04	322,477	88,249	26.54
6	40,880	9,508	23.26	47,961	10,501	21.89
8	64,153	6,200	9.66	64,599	5,875	9.09
2	166,530	79,728	47.87	152,321	74,364	48.82
9	93,380	52,866	56.60	75,007	44,291	59.04
9	9,463,928	2,493,602	26.36	9,312,091	2,402,360	25.80
9	4,165,206	891,541	21.40	4,030,212	820,647	20.61
3	3,612,093	1,057,592	29.28	3,628,076	1,057,237	29.14
2	1,426,719	411,875	28.86	1,426,475	395,820	27.74
0	259,910	132,594	51.01	227,328	118,655	52.19

o passenger receipts at time of sale.

merce Commission and the United States Supreme Court have decided that each class of service should stand by itself, and therefore, inasmuch as the passenger business is not earning as large a return as the freight business, the passenger fares ought to be increased.

We do not understand that such an argument is supported by either the decisions of the Interstate Commerce Commission or those of the courts. If there are such decisions, our attention has not been called to them.

It goes without saying that neither class of traffic should be unduly burdened for the benefit of the other. It is not our view that in a situation like the present one, where a great railroad system in a State is made up of many underlying companies which were formerly operated independently, and said system is now split up into divisions, some of which are unable to earn their operating expenses, the divisions which are profitable must be made to bear the cost of transporting passengers on the unprofitable divisions to the full extent of such losses. Such a determination would in our opinion not only be unwise but it would be unreasonable and unjust to that portion of the traveling public which furnishes the traffic for the profitable division. This however is not in harmony with the views of the counsel for the railroad, who stated that the passenger traffic must be regarded as a whole; that if the income from intrastate traffic is not enough to pay the expenses of that traffic as a whole the income must be treated as a whole, and if there is to be any increase in rates it must be upon the whole business; that the general condition is the one that should be dealt with leaving out any particular local conditions (page 287 S. M.).

The following is an extract from New York Central Exhibit No. 4:

NEW YORK CENTRAL RAILROAD

Statement showing passenger business on lines east of Buffalo in New York State, excluding Boston and Albany, St. Lawrence and Adirondack, and Ottawa and New York.

Years 1910-1914 inclusive are N. Y. C. & H. R. R. R., and 1915 is an estimate for N. Y. C. R. R. based on percentages of previous years. (Applicant's Exhibit No. 4.)

	1910	1911	1912	1913	1914	1915
Passengers						
Interline.....	2,353,490	2,347,643	2,352,806	2,555,255	2,299,452	1,839,441
Local.....	24,702,809	25,090,988	25,835,450	26,842,162	25,477,116	24,076,134
Commutation.....	8,818,459	9,129,987	9,911,274	10,792,014	11,104,938	11,520,956
Total.....	35,874,758	36,568,618	38,099,530	40,189,431	38,881,536	37,435,531
Miles.....	1,372,995,106	1,388,405,145	1,451,173,172	1,559,558,703	1,445,665,202	1,396,117,043
Passenger revenue, intrastate.....	\$15,513,036.53	\$15,836,008.01	\$16,050,913.15	\$17,001,026.19	\$15,744,493.97	\$16,381,828.47
Passenger revenue, interstate.....	8,813,659.24	8,848,587.71	9,734,076.97	10,784,321.30	10,163,731.48	9,403,729.17
Total passenger revenue (Acct. 2 for 1910-1913); (Acct. 102 for 1914-1915).....	\$24,326,695.77	\$24,684,595.72	\$25,784,990.12	\$27,785,347.49	\$25,928,225.45	\$25,785,557.64
Average rate per passenger per mile, cents.....	1.772	1.778	1.777	1.782	1.764	1.847
Average amount received per passenger, cents.....	67.810	67.502	67.678	69.136	66.685	68.880
Average distance each passenger carried, miles.....	38.27	37.97	38.09	38.81	37.18	37.29

From this it will be seen that for the year ended December 31, 1915, the number of interstate and intrastate passengers carried in the State of New York was less than for any one of the previous five years, but that the number of commutation passengers has steadily increased every year: that the number of such passengers carried in 1915 was 30.6 per cent in excess of the number carried in 1910. The number of passenger-miles in 1915 was less than for any one of the five preceding years except the years 1910 and 1911, and the revenue from intrastate passengers was more than that for any one of the preceding five years except the year 1913, while the interstate revenue was less than that for the years 1912, 1913, and 1914; indicating, we believe, that when general business throughout this section of the country is depressed the interstate business falls off to a greater extent than the intrastate business. The total passenger revenue for 1915 was more than for any of the preceding years except 1913 and 1914. This tabulation also shows that the average rate per passenger per mile has increased each year notwithstanding the very severe business depression throughout the year 1914 and during the early part of the year 1915; that the amount received per passenger in 1915 was more than in any of the previous five years excepting 1913; and that the distance each passenger was carried in 1915 was less than in any of the previous five years excepting 1914.

The conclusion that we must necessarily draw from these figures is that the business of the company has been gradually increasing under normal business conditions; that its passenger-mile earnings are increasing, probably due to the fact that more passengers are riding per train, and that the pronounced increase in the number of commutation passengers with the correspondingly low rate for such service is tending to keep down the average rate per passenger per mile which would otherwise be very materially increased, because these commutation tickets are sold at a rate considerably below the average rate per passenger per mile in the year 1915. It should also be noted that the revenue for the six

years in question includes nothing for mail, express, and excess baggage, and such other items as are ordinarily credited to passenger service revenue.

The accompanying statement (Table II) is a summary made up from the New York Central Exhibit No. 8.

This sets forth very clearly the true facts with reference to the operation of the New York Central. The figures purport to show the earnings per passenger-train mile derived from both intrastate and interstate passengers in the State of New York east of Buffalo. It shows that the main line and branches which comprise the main trunk of the railroad from New York city to Buffalo earned an average of \$1.88 per train-mile in 1915, which was in excess of similar earnings during any of the previous five years, and that such earnings had increased during each of those years; that the earnings on the Harlem division are increasing each year; and that the earnings on each of the other six divisions mentioned, except possibly the River division (West Shore), were probably less than the operating expenses per train-mile.

It also shows that 56.4 per cent of the total train-miles operated in the State of New York pertains to the main line and branches, which includes the Hudson River division on which the maximum fare is now 2.17 cents per mile and which it is now proposed to increase to 2½ cents per mile; and that the total passenger-train miles on all other divisions in the State is but 43.6 per cent of the total passenger-train miles in the State; also, that the main line and branches earn 71.1 per cent of the total passenger revenue of all the lines in the State east of Buffalo. The passenger earnings of the New York Central railroad per train-mile on the main line seem to be high as compared with other roads notwithstanding the maximum charge per mile on the main line between Albany and Buffalo is only two cents. In addition, it carries on its various lines many passengers who use different forms of reduced fare tickets at two cents per mile and less. These lower rates of course reduce the general average receipts per passenger-mile.

NOTES

	1914			1915		
	Earnings	Train-miles	Av. per mile	Earnings	Train-miles	Av. per mile
7	\$19,259,580.38	10,593,538	\$1.82	\$18,975,485.26	10,101,591	\$1.88
7	1,970,701.15	1,538,507	1.28	2,080,961.85	1,508,314	1.37
8	3,075,973.38	2,741,432	1.12	2,676,650.45	2,611,910	1.02
0	169,220.75	400,092	.42	155,854.54	366,871	.42
3	543,340.34	555,765	.98	485,293.60	549,763	.88
4	1,662,917.67	2,073,004	.80	1,524,467.23	2,037,047	.75
0	309,471.64	452,752	.68	290,051.03	438,031	.66
6	150,344.97	293,224	.51	133,097.00	289,038	.46
4	\$27,141,550.16	18,648,364	\$1.46	\$26,301,880.96	17,902,565	\$1.47



The only conclusion that we can draw from these figures is that the company is not deriving a sufficient return from divisions other than the main line and branches and possibly the Harlem division, and that properly any operating loss on passenger operations is directly chargeable against the six divisions other than those just above referred to.

At this point it is proper to observe that the trains operated on the other divisions are in many respects different from those on the main line. Different equipment and motive power are used, fewer trains are operated, and the track structures are not as heavy; and it is probably true that the expenses per train-mile are less. The facts regarding them can all be readily brought out if any effort is made to justify increased rates on any of those divisions.

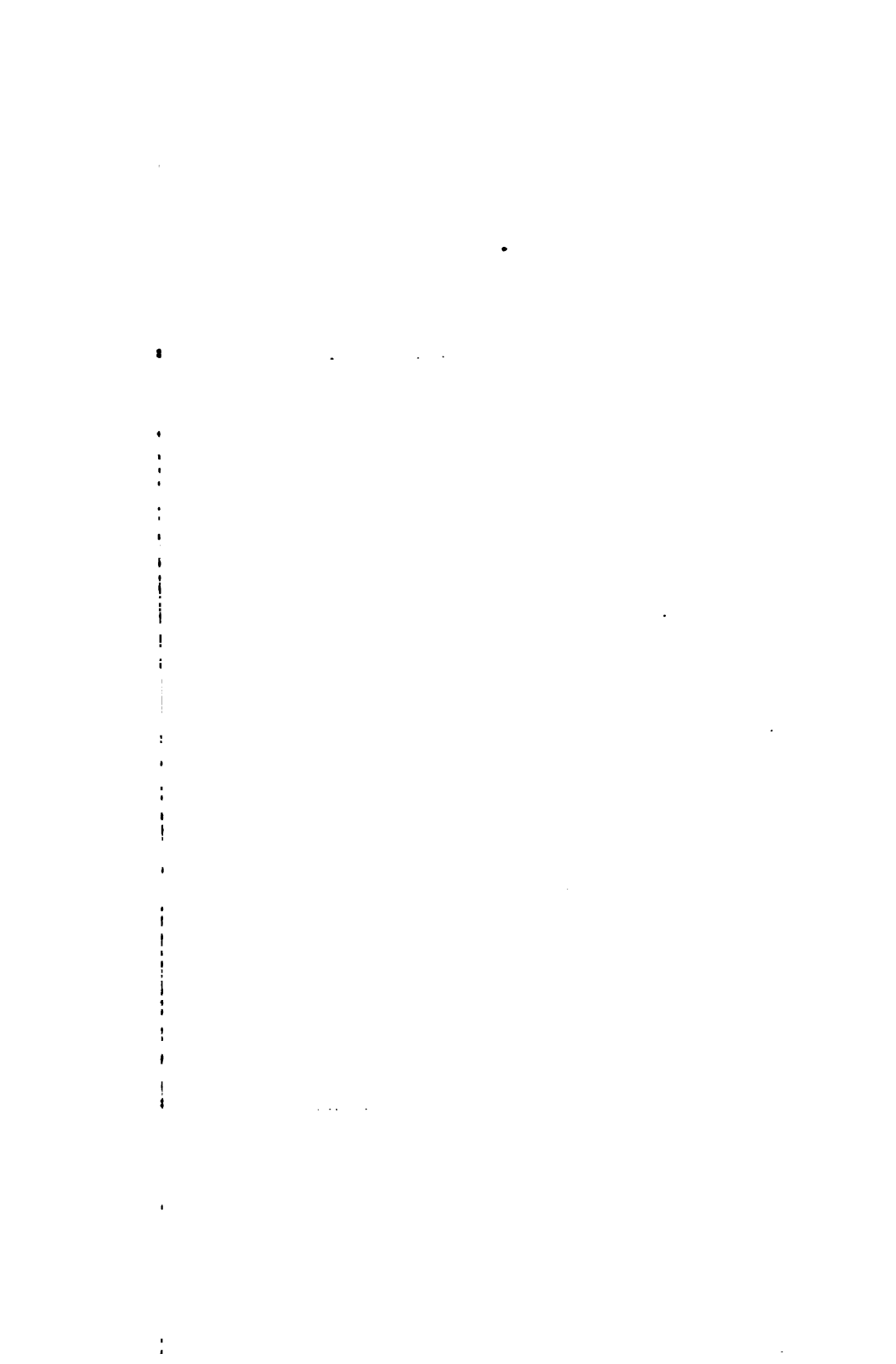
We are fully convinced that no injustice is done The New York Central Railroad Company in this case by taking the revenue from interstate passenger traffic on the lines east of Buffalo into consideration with the revenue from intrastate passenger traffic in the same territory, for we know from general observation over a period of years that the great bulk of the interstate passenger traffic in the State of New York is over the main line between New York city and Buffalo, on which route the fare is 2 cents per mile for a distance of 297 miles, and 2.17 cents per mile for a distance of 143 miles. Assuming that 80 per cent of the interstate passenger traffic in the State is averaged over the main line: namely, that part between Albany and New York where the fare is 2.17 cents per mile, and that part between Albany and Buffalo where the fare is 2 cents per mile, then the average fare for such interstate passengers would be 2.06 cents per mile. Assuming that the balance of the interstate passengers, to wit 20 per cent, averaged $2\frac{1}{2}$ cents per mile, then the average for all the interstate passengers carried on the line east of Buffalo in New York state would be 2.148 cents per mile. Taking this figure to represent the amount received per mile for interstate passengers, we find that in 1910 the interstate mileage in the State of New York amounted to 410,319,332,

which equals 29.9 per cent of the total passenger-miles in the State for that year. Likewise, if we apply the same theory to the year 1915, we find that the interstate passenger-miles in the State equalled 437,790,000, or 31.3 per cent of the total passenger-miles in the State.

The witnesses for the New York Central read into the record various figures which had been prepared to show that the intrastate trains were being operated at a loss. A tabulation of these figures was used on the hearing, but the same was not read in evidence although it was doubtless intended that it should be. We therefore present it here, in accompanying Table III, inasmuch as most of the figures are in the case. It is necessary that they be presented in this form in order to explain more clearly our views regarding them.

It may be of interest to present with the foregoing figures and for consideration therewith the accompanying summary (Table IV) showing the separation of operating expenses which was introduced as Exhibit No. 1 by the railroad.

In determining the proportion of operating expenses which should be charged against interstate passengers it was assumed that the interstate traffic should bear 6.4 per cent of the total passenger operating expenses, because 6.4 per cent of the total passengers carried in the State were interstate passengers. For the reasons already stated, we believe it is not correct to determine the percentage of interstate expense in this way, when the percentage of interstate passenger-miles in 1910 was 29.9 per cent, and in 1915, 31.3 per cent of the total passenger-miles in the State. It is true that the record shows that it is cheaper for the New York Central to carry interstate passengers because of the fact that most of them travel in Pullman cars and that the Pullman equipment is furnished without expense to the New York Central. On the other hand, however, the Central is obliged to provide way and structures, terminals, switching, power equipment, and to incur a certain amount of transportation and traffic expense as well as general expenses on account of such passengers; so that even giving due credit





1912			
	Y. C. & H. R.	Passenger	Freight
Maintenance of way and structure	2,423,572.18	\$5,170,400.05	\$7,253,172.13
		41.62	55.88
Maintenance of equipment.....	18,637,094.88	5,790,733.03	12,846,361.85
		31.07	68.93
Traffic expenses.....	2,066,422.51	886,119.33	1,180,303.18
		42.88	57.12
Transportation expenses.....	33,380,913.00	10,961,024.16	22,419,888.84
		32.84	67.16
General expenses excluding outside	2,364,684.31	810,850.25	1,553,834.06
		34.29	65.71
Totals, excluding outside operation	\$8,872,686.88	23,619,126.82	45,253,560.06
		34.29%	65.71%
General expenses, including outside	2,364,684.31	820,545.46	1,544,138.85
		34.70	65.30
Outside operations.....	4,900,098.53	1,968,404.69	2,931,693.84
		40.17	59.83
Total expenses, including outside	\$73,772,785.41	25,597,226.72	48,175,558.69
		34.70%	65.30%

*New York Central R.R. Co., East of Buffalo, excluding
B. & A., St. L. & A., and O. & N. Y.
(Applicant's Exhibit No. 11.)*

1915			
	Passenger	Freight	12 Mos., 1915
Maintenance of way and structures	784,940.18	\$6,153,304.62	\$10,938,244.80
	43.75	56.25	
Maintenance of equipment.....	5,712,613.55	14,204,726.36	19,917,339.91
	28.68	71.32	
Traffic expenses.....	774,126.40	1,139,788.64	1,913,915.04
	40.45	59.55	
Transportation expenses.....	0,006,425.53	23,487,982.15	33,494,407.69
	29.87	70.13	
General expenses, excluding outside	853,842.37	2,105,509.94	2,959,352.31
	28.85	71.15	
Totals, excluding miscellaneous op	2,131,948.03	47,091,311.71	69,223,259.74
	31.97%	68.03%	
General expenses, including miscel.....			
Miscellaneous operations.....			
Total expenses, including miscella.....			

for the saving made by carrying them in Pullman equipment, it would probably not make a very appreciable change in the operating cost per train-mile. It will be seen that a different situation is presented by basing the interstate expense on the interstate mileage in the State. In the foregoing tabulation the earnings include revenue from mail, express, and excess baggage in the State, and the operating expense covers this service as well as the expense applying strictly to passengers. This was necessary because of the difficulty of segregating the expenses chargeable to mail, express, and excess baggage. In determining the percentage of interstate passenger-miles in the State we have only taken into consideration the actual revenue from passengers alone.

The following table shows the expense per train-mile for intrastate trains for the years 1910 and 1915, which are obtained by allocating to interstate passenger service in the State 29.9 per cent and 31.3 per cent respectively of the total operating expenses.

	1910	1915
Total revenue intrastate.....	\$21,510,472.15	\$23,449,698.73
Total operating expense, Line East.....	21,899,503.44	22,131,948.03
Percentage of mileage in New York state.....	79.65%	79.74%
Operating expense in New York state.....	17,442,954.48	17,648,005.35
Percentage of expense applicable to interstate passengers based on interstate passenger-miles.....	29.9%	31.3%
Operating expense applicable to interstate passengers based on foregoing percentages.....	5,214,443.38	5,523,825.67
Operating expenses applicable to intrastate passenger traffic.....	12,228,511.10	12,124,179.68
Total taxes chargeable to passenger traffic.....	1,464,619.38	1,882,344.26
Deduct taxes chargeable to interstate traffic based on foregoing percentages.....	448,921.19	589,330.25
Taxes chargeable to intrastate traffic.....	1,015,698.19	1,293,514.01
Interest charges applicable to passenger traffic.....	3,429,123.66	7,166,621.18
Deduct interest charges applicable to interstate traffic based on foregoing percentages.....	1,025,307.97	2,243,152.43
Interest charges applicable to intrastate traffic.....	2,403,815.69	4,923,468.75
Total expense chargeable to intrastate traffic, including interest and taxes.....	15,648,024.98	18,341,162.44
Difference between intrastate revenue and expense.....	5,862,447.17	5,108,536.29
Total train mileage in State.....	20,209,264.00	17,763,384.00
Revenue per train-mile intrastate.....	\$1.06	\$1.32
Expense per train-mile intrastate.....	0.774	1.03
Excess of revenue per train-mile over expense per train-mile.....	0.286	0.29

We think these figures demonstrate that the company is earning a fair return on its intrastate passenger traffic if we are correct in assigning to interstate traffic its fair share of the expenses, to be based on the assumption that the expense

chargeable to interstate traffic should be founded upon the ratio of interstate passenger-miles to the total passenger-miles in the State.

Attention is called to the fact that the total interest charges assigned to the line east for 1915 were more than double the interest charges for the year 1910. It was brought out on the hearing that this was due among other things to the fact that the company had charged against the line east a certain percentage of the total interest charges of the company. These charges include interest on bonds issued to purchase the stocks of other railroads and also interest on bonds of underlying companies outside the State of New York. It was stated by the witnesses for the railroad that it was difficult to determine exactly what proportion of the interest on the obligations of The New York Central Railroad Company should be chargeable to the line east. It does not seem to the Commission that the intrastate traffic in New York should be charged with any portion of the interest on obligations issued to acquire the stock of other companies whose lines are either west of Buffalo or outside of the State of New York. In any event, it is probably true that if it could be determined exactly what amount of interest properly should be charged against the line east, the expenses per train-mile would be somewhat reduced beyond those which are set forth in the last tabulation.

At the hearing on April 10th, objection was made to Exhibit No. 6, filed by the railroad company, on the ground that at the outset of the case it was announced that the railroad company did not intend to go into the question of the valuation of the property nor of interest or fixed charges of any kind. Counsel for the railroad company stated that since the complainants had brought into the case the question of all passenger earnings, interstate as well as intrastate, it was considered proper to present for the consideration of the Commission the entire expense applicable to passenger earnings which would include interest, rentals, and taxes.

At this point it might be proper to consider the following Exhibit No. 6, set forth in full:

PROPOSED NEW PASSENGER FARES, N. Y. C. R. R. Co. 253

	1910	1911	1912	1913	1914	1915
The total passenger service revenue on the Line East was.....	\$32,024,680.21	\$32,619,568.26	\$34,086,331.31	\$36,514,748.61	\$34,028,415.71	\$34,267,827.60
The total passenger operating expense on the Line East was.....	21,809,503.44	21,761,748.13	23,619,126.83	26,480,098.78	24,081,643.57	21,979,495.39
The total on the Line East was.....	17,161,904.83	18,347,683.36	20,243,006.73	20,835,936.87	22,654,055.76	24,832,574.67
The percentage of maintenance of way applied to passenger train traffic was.....	43.03%	42.67%	41.62%	43.24%	44.02%	43.90%
This percentage, 43.03%, applied to the total cost of interest and rentals would produce amount chargeable to passenger traffic as follows.....	7,384,767.64	7,828,956.48	8,425,139.40	9,009,459.10	9,972,315.34	10,653,174.53
The total taxes on the Line East were.....	3,316,186.00	4,580,145.41	5,087,013.23	5,537,207.08	5,335,766.41	5,397,095.58
The percentage of maintenance of way, 43.03%, applied to the total taxes would produce amount chargeable to passenger traffic as follows.....	1,642,104.83	1,954,848.14	2,104,728.90	2,394,288.34	2,348,804.37	2,315,354.00
This latter figure added to the operating expense and net amount of interest and rentals would produce the total expense of passenger traffic on the Line East as.....	30,926,375.91	31,545,053.75	34,148,905.12	37,883,846.22	36,402,763.28	34,948,023.92
The difference between the total revenue on the Line East and the total expense on the Line East is (revenue less than expense \$416).	1,098,304.30	1,074,515.51	53,663.81	1,369,087.61	9,574,357.67	680,196.38
The total train mileage on the Line East was.....	22,316,560	21,969,506	22,172,272	23,163,928	21,327,908	20,898,098
Dividing the total number of train-miles on the Line East into the total revenue on the Line East would produce revenue per train-mile of.....	\$1.43	\$1.48	\$1.53	\$1.57	\$1.56	\$1.64
Dividing the total number of train-miles on the Line East into the total expense on the Line East would produce expense per train-mile of.....	\$1.38	\$1.43	\$1.54	\$1.63	\$1.70	\$1.67
The difference between revenue per train-mile and expense per train-mile is (revenue less than expense \$416).....	\$0.05	\$0.05	\$7.01	\$0.06	\$0.11	\$0.03

¹ Includes mail, express, and excess baggage.

This exhibit purports to show the total passenger service revenue on the line east, interstate and intrastate, including mail, express, and excess baggage. This revenue, however, does not include a considerable amount derived from other earnings which it was claimed should properly be credited to passenger service revenue, and this same remark applies to other statements relating to passenger revenue. It does not show the amount of operating expenses per train-mile excluding interest, rental, and taxes, nor the percentage of operating expense per train-mile including taxes and excluding interest and rentals. We have therefore prepared the following table to indicate these percentages.

	1910	1911	1912	1913	1914	1915
Total revenue per train-mile...	\$1.43	\$1.48	\$1.53	\$1.57	\$1.59	\$1.64
Expense per train-mile, including interest, rentals, and taxes.	0.985	0.99	1.065	1.143	1.13	1.051
Expense per train-mile for interest, rentals, and taxes.	0.395	0.44	0.475	0.487	0.57	0.619
Percentage of expense per train-mile, including taxes and excluding interest and rentals...	73.5%	72.7%	75.4%	79%	77.6%	70.8%

The charges for taxes, interest, and rentals have increased rapidly since 1910. That these charges are bound to increase from year to year goes without saying when the trend of the times and the growth of a great system like the New York Central are considered. In this Exhibit No. 6 the total interest and rental charges in 1915 against the lines east were \$24,832,574.67. From our analysis of the statement furnished by the New York Central, showing in detail interest charges and rentals for the year 1915 which was filed as complainants' Exhibit No. 8, we are unable to find any justification for charging against the line east in 1915 more than \$19,353,370.67 as an outside figure for interest and rentals, and this we believe is in excess of the amount which is properly so chargeable. On this basis, if we take the maintenance of way percentage of 42.9 per cent as applied to passenger-train traffic, the amount of interest which should be charged to passenger traffic would not exceed \$8,302,596.02. Adding

to this the other expenses as set forth in Exhibit No. 6, we have a total operating expense of \$32,597,445.41, or \$1.56 per train-mile, which figure it should be remembered includes not only the bare operating costs but also all fixed charges such as interest on bonds and other obligations, rentals of leased lines, and taxes.

It may be of interest to note that at page 95 of the minutes it was stated that current improvements had been made applicable to passenger traffic, as follows:

<i>Year</i>	<i>Total</i>	<i>Amount applicable to intrastate passengers:</i>
1910.....	\$5,310,000	\$2,140,000
1911.....	6,384,000	2,552,000
1912.....	9,881,000	3,870,000
1913.....	7,839,000	3,186,000
1914.....	9,000,000	3,744,000

On cross-examination the Witness Vosburgh, representing the railroad, testified (page 188, S. M.) that the \$3,744,000 expended for current improvements in the year 1914 and charged to passenger traffic in the State of New York covered improvements to right of way, bridges, stations, etc.; that they entered into the cost of service and were included in operating expenses in its account "Maintenance of Way and Structures". It may be that these amounts properly represent capital expenditures, and if so, then the operating expenses chargeable to passenger traffic would be very considerably decreased. However, we have not considered it necessary to further analyze these particular expenditures because the result would not in any way change our proposed determination.

It is a well known fact that in recent years all of the railroads have been subjected to increased costs of operation. The replacement of wooden passenger cars by others made of steel, the use of larger freight cars and heavier motive power equipment has necessitated the installation of heavier rails and improvements in roadbed and structures. Increased safety has also required the installation of the block signal system. And all of these things have inevitably increased

the cost of operation. A large part of the increased expense is due to increasing labor costs which have been mounting gradually in recent years; and even at the present time the railroads are confronted by a demand for substantial increases in wages in connection with the passenger service. While we can take notice of these facts, yet we do not know what the additional burden upon the New York Central may be, and we can not determine that an increase in rates should be granted on that account alone. The question of wages which confronts the railroads is a serious one, and there must be a certain point beyond which the demands for increased wages must cease, because if granted the result may be equivalent to a confiscation of the property. Wages can not be steadily increased unless additional earnings are obtained which will provide therefor, and there is a limit beyond which the patient and long suffering public will probably be disinclined to go, because it in the final analysis pays all these labor costs.

While many other exhibits were presented for consideration in this case, yet we do not believe it is necessary for us to discuss them, as we consider that we have dealt with those which are most important for the purpose of arriving at a proper determination with the exception of those relating to the belt line service between Albany and Troy.

Among the tariffs under suspension in this case are those filed by The Delaware and Hudson Company and The New York Central Railroad Company covering rates for passenger service between the cities of Albany and Troy. These tariffs provide for a 15-cent single-trip fare between Albany and Troy instead of a 10-cent fare as now charged. There are in force between these cities a 46-trip monthly school commutation ticket and a 54-ride monthly commutation ticket which are sold at \$3 and \$4.50 respectively. No tariffs have been filed changing the rates on these commutation tickets. The basis for interstate tickets between Albany and Troy is now 15 cents.

The union stations in these two cities are about 7.3 miles apart. The city of Troy is on the east side and the city of Albany on the west side of the Hudson river. The Delaware and Hudson Company and The New York Central Railroad Company operate what is known as a belt line service between the two cities, the New York Central owning the tracks on the east side of the river and The Delaware and Hudson Company those on the west side. In this belt line operation two substantial steel bridges over the Hudson river form a part of the route. The patrons of this belt line service reside principally in Albany and Troy and the territory intermediate thereto.

The Delaware and Hudson Company receives all tickets collected on trains operated on the west side of the river whether they are Delaware and Hudson trains or New York Central trains, and similarly the New York Central receives all the Albany-Troy tickets collected on the east side of the river. The total receipts from Albany-Troy passengers over the belt lines are divided equally between the two companies. The revenue on intermediate traffic is turned over to the company on whose line the business is done, i. e., The Delaware and Hudson Company gets all the revenue from intermediate traffic on the west side and the revenue from such traffic on the east side goes to the New York Central. Very little baggage or express matter is carried on the belt line trains.

The figures presented to the Commission in relation to this belt line traffic are so conclusive that no extended discussion would seem to be required. They show that the cost per train-mile of operating these belt line trains, for locomotive fuel and repairs, enginehouse expenses, train supplies, and wages of train crews are more than the revenue per train-mile, and that no earnings are derived from the operation of these trains to provide for station and terminal expenses, maintenance of way and structures, repairs to passenger cars, or for traffic expenses or general expenses. No data, however,

has been furnished to show the earnings derived by the New York Central and The Delaware and Hudson Company from passenger traffic originating south of Albany or north of Troy and passing over the tracks on which the belt line trains are operated. It may be that if this traffic were considered the situation would be considerably altered so far as revenue is concerned. The only conclusion we can properly draw from the figures presented is that the belt line trains in and of themselves do not at the present time earn enough to cover the expense of operating them. This does not conclusively prove that the fare between Albany and Troy should be increased, but it may be a fair indication that there is more service being given on the belt line than the traffic justifies. The Delaware and Hudson Company is obliged by law to give reasonable passenger train service on the west side of the river between Albany and Green Island, if not into Troy; and on the other hand the New York Central is likewise obliged to give reasonable passenger train service between Rensselaer and Troy on the east side of the river. Perhaps the two corporations determined that this could be accomplished better and more economically by the operation of a belt line than to have each company operate passenger trains independently from Albany to Troy.

If we accepted the theory of counsel for the New York Central, that the whole passenger traffic in the State must be considered in connection with any increase of rates, further attention to this particular phase of the situation would be unnecessary, because we understand the earnings of the belt line trains on the east side of the river by the New York Central are included in the train operations covered by the title "Main Line and Branches" in the New York Central Exhibit No. 8. The railroad companies, however, having sought to present the facts with reference to the belt line operation separately, we have determined to so consider them, and not pass the subject by without giving some explanation

of the reasons which have caused us to reach the determination that the belt line fares should not be increased at this time.

While dealing with the proposed increase in fares on the belt line, we desire to call attention to the fact that even if we had concluded an increase in these fares was justified, the portion of the tariff which has been filed and under suspension relating to this service is not properly constructed, for the reason that while the proposed fare between the two cities is 15 cents, or approximately 2 cents per mile, yet the proposed fare between certain intermediate stations is based on $2\frac{1}{2}$ cents per mile. Inasmuch as any increase between these intermediate stations would in practically every instance be quite substantial, any increased fare should properly be based on the rate per mile between Albany and Troy. Under the circumstances, however, and in view of what we have hereinbefore stated, we are of the opinion that The Delaware and Hudson Company and The New York Central Railroad Company have not justified the proposed increased fares on the belt line.

There may be some changes in the existing tariffs of the New York Central which are made necessary by mileage changes, and if so, they should be permitted, and separate tariffs should be filed to cover them.

While we had thought it would be unnecessary to discuss the various legal propositions presented, nevertheless the complainants filed a supplemental brief covering a point which ought not to pass unnoticed. It is with reference to chapter 216 of the laws of 1846 under which the Hudson River Railroad Company was incorporated. This act was amended by chapter 30 of the laws of 1848, and by chapter 9 of the laws of 1850. Chapter 30 of the laws of 1848 was amended by chapter 210 of the laws of 1884. The original act of 1848 has never been expressly repealed, except section 18 which was repealed by chapter 593 of the laws of 1886. Counsel for the complainants therefore contend that The New York

Central Railroad Company is limited as to its fares on the Hudson River division by the provisions of the law of 1846 above referred to and its amendments. This contention is untenable. The Court of Appeals has disposed of the matter in the case of *Johnson vs. Hudson River R. R. Co.*, 49 N. Y. 455, in which case it held that the limitation as to fares had been removed by the General Railroad Act of 1850, chapter 140, section 49. This case was decided in 1872, and since that time the situation has been governed by this ruling of the Court of Appeals.

Under the circumstances, therefore, it is apparent that this contention of the complainants on this proposition can not be upheld, and that The New York Central Railroad Company is not limited on its Hudson River division to the rate of fare set forth in chapter 216 of the laws of 1846.

From all the evidence which has been presented to us in this case, we are convinced that the New York Central has failed to justify any increase in its fares on its Hudson division between Albany and New York. As we have hereinbefore stated, the main line of the New York Central, even with the maximum fares ranging from 2 cents to 2.17 cents per mile, is earning a fair return, and the earnings on several of its other divisions are probably insufficient to pay a fair return on the passenger service on those divisions. We call attention to the fact here, that on some of those divisions, namely the Putnam and the Harlem, the existing tariffs are full of discriminations, and the tariffs which are now under suspension would probably remove many of these discriminations. In any event, it would seem advisable for the company to give prompt consideration to the criticism here made of the existing tariffs on these particular divisions, to the end that discriminations may be removed. It would probably necessitate some study on the part of the railroad officials to determine whether or not it will seek to advance the rates on any of the divisions which are now operated at a loss, and for that reason we think the better way to dispose of the

matter is to require the cancellation of all the passenger tariffs filed by the New York Central which have been under suspension pending this investigation and an order will be entered to that effect.

All concur except Commissioner Emmet, dissenting in part.

EMMET, Commissioner:

With many of the statements of fact, and with some of the conclusions expressed in the majority opinion in this case, no unprejudiced person will find reason for substantial disagreement. If the question before us was only whether The New York Central Railroad Company can, in view of its earnings during the year 1915 and part of 1916, be considered sufficiently in need of increased revenues to require us upon this ground alone to approve of the rate increases provided for in the new tariffs which have been filed with us, I think I am nearly enough in accord with Mr. Carr's expressed views on this point to justify me in accepting them as substantially my own.

But I have been unable to satisfy myself entirely that the question of the adequacy of the present returns from intrastate passenger business is the only question involved here. The present proposal impresses me rather as an attempt to readjust, than as an attempt to raise, existing tariffs. That the plan should provide for increases as well as decreases in existing rates is, of course, inevitable under the circumstances. Leaving commutation rates near New York city out of the question entirely — for these are not affected by the new schedules — most of the increases would occur on the Hudson and Harlem divisions where the prevailing rate is now about 2.17 cents per mile. Even on one of these divisions (the Harlem division) decreases as well as increases would take place, due to the removal of ancient local discriminations which have crept into the New York Central's

tariffs in the course of years — as similar discriminations have doubtless crept into the tariffs of many other utility companies during the same period. The Hudson and Harlem divisions are those upon which it may be said, speaking broadly, that the most improved service is now being given to the public. The divisions upon which rate reductions will under the new schedules predominate over increases are those upon which, on account of local needs and conditions, the service has in the past been least modern, or as the saying is, "up-to-date". The new schedules will, if allowed to take effect, result in the correction of these inequalities, and in establishing — so far as this may be done under certain provisions in the company's New York charters — absolute uniformity in passenger rates on the New York Central system throughout the State, except as to those rates which obtain in the properly recognized and so called "commutation zone" near New York city, and on the Troy-Albany belt line service hereinafter referred to.

I have felt that this application should be viewed somewhat in the light of these resulting public benefits and advantages, and that the possible effect which an incidental raising of some existing rates may have upon the finances of the New York Central system should be regarded as only one feature of the case, and not necessarily a controlling feature. There is nothing in the case to show, as a matter of fact, that the ultimate effect of the new tariffs will in the long run be to raise the company's intrastate passenger revenues materially. As to whether it does or not, depends upon many future happenings which can not accurately be forecasted now. The most that can be said is that if all other factors involved in the problem remain about as they are today the readjustment of rates would, if it went into effect, probably — though by no means certainly — result favorably to the railroad from a financial point of view. But the mere fact that this is anticipated, or at least hoped for, by the owners

of the railroad, does not seem to me to free us from the duty of inquiring carefully into the other aspect of the case that I have mentioned.

For the purposes of this argument I am assuming that this Commission has power to approve of rate increases upon other grounds than need of additional revenue. I find nothing either in our statutes or in the decisions of our courts which seriously shakes my belief that we have such power. The question, then, is whether the announced intention of The New York Central Railroad Company to take, with the aid of this Commission, a long step forward toward the establishment of absolutely uniform passenger rates throughout the State of New York does not contain enough of public benefit and advantage to warrant us in giving our approval to such incidental (and as expressed in percentages, slight) rate increases as are necessary for the carrying out of the plan; leaving the doubtful question of the effect which the readjustment will have in the long run upon the finances of the company to be determined hereafter, not by guesswork but as the result of actual experience with the new rates.

Looking at the matter from this point of view we ought, I think, to bear in mind, first, that a pretty definite governmental policy in favor of uniformity in railroad rates has crystallized during recent years, not only in New York but throughout the United States. This tendency has expressed itself both in legislation and in the decisions of our courts and regulatory bodies. On the whole, I think the movement has been a movement in the right direction. It is perfectly true, of course, that conditions differ in different parts of the territory served by a great railroad system like the New York Central, and under an ideal system of rate making the neighborhoods in which railroad service has remained most nearly in its primitive state ought perhaps to pay lower rates than neighborhoods in which a highly modern and efficient service is given. This is on the simple principle that people ought not to have to pay for more than they get — that those

who get the best ought to pay the most. Practically, however, the tendency has been the other way, until the counter-tendency of which I speak, on the part of legislatures and regulatory bodies, toward uniformity in rates, occurred to check it. Sparsely settled regions with primitive railway service have for the most part been paying higher rates than neighborhoods in which the last refinement of modern transportation has been installed. To some extent this is now the situation on the New York Central system, and the present effort to make rates uniform on that system seems to me to be about the first practical step that has been taken to deal with conditions which, theoretically at least, can not be defended. And I am inclined to believe that no nearer approach to the ideal than a substantial uniformity in railroad rates over a large system can ever be hoped for. The varying grades of service given by a railroad like the New York Central on its different divisions may be assumed, I suppose, to approximate fairly closely in each case to the varying needs of the neighborhoods which are served. Simple, unpretentious trains, and comparatively infrequent runs, in a sparsely settled region where travel is light, may be assumed to meet the needs of such a neighborhood almost if not quite as well as the best of service meets the needs of a thickly settled and busy region. Whenever improvements in service are needed the regulatory powers of the State may, if the railroad is in a prosperous condition financially, be speedily resorted to, to set the matter straight. It seems from this point of view to be a reasonable theory that if all localities are served approximately as their differing needs require — if in each locality the same relative approach to the ideal, in the matter of service, takes place — all localities should pay approximately the same rate a mile for the service they get.

Looking at the matter from this point of view, I feel favorably inclined toward the idea of uniform rates on the New York Central for two reasons: First, I think the

principle of uniformity can be justified, upon abstract grounds, as in the long run substantially fair; second, I think that so far as the New York Central is concerned, the application of this principle would result in correcting, in the only practicable manner, an extremely unethical and discriminatory condition which now exists between this company and its patrons in different parts of the State,— a condition under which rates are at present highest where service is poorest, and lowest where service is best.

It has been suggested that because the plan we are considering contemplates no change in the rates now in force on branches of the system where a 2-cent rate has been established by charter, the present attempt to equalize rates should be viewed unfavorably. I do not agree with this view, although I admit that, for the reason stated, the plan now before us is not as comprehensive a step toward uniformity in rates in New York state as should ultimately be taken. But this seems to be an inherent difficulty in the situation for which the railroad itself is not responsible. It may be that under the recent decision of the Court of Appeals in the Ulster and Delaware case, which sustained the right of the Public Service Commission to approve of increases in rates established by general legislative enactment, it will ultimately be held by the Court of Appeals that the Commission has power also to approve of increases in rates which were fixed by the State as a fundamental condition of the railroad's right to exist at all. The underlying reasons for the Ulster and Delaware decision may ultimately carry the Court of Appeals to that point. But there are some fairly strong considerations to be urged on the other side; and on the whole I do not feel that the railroad's failure to include its rates between Albany and Buffalo in the present plan suggests any such deliberate desire to bring about only a partial uniformity of rates in the State of New York at this time as would warrant our rejecting the present application on this account.

It seems to me that for the purposes of this application the railroad is quite justified in assuming that the Public Service Commission would have no authority to approve an increase in rates fixed by charter, and that the Commission is justified in acting on the same assumption. Therefore, notwithstanding the fact that the present proposed readjustment makes no effort to deal with rates between Albany and Buffalo, it is fairly entitled, I think, to be regarded as an effort made in absolute good faith by The New York Central Railroad Company to establish its passenger rates in New York state on a more equitable basis than they have ever been on previously — an effort which should not, in my opinion, be thwarted by this Commission merely because the Albany-Buffalo rates are not included in it. I assume, of course, that whenever the question of the jurisdiction of the Commission over these last mentioned rates shall be settled in favor of the Commission's right to permit them to be increased, new tariffs designed to equalize disparities between the present Albany-Buffalo rates and rates on the other divisions of the Central's system will be filed with us, whether the present application is granted or not. Pending that event I see no reason to interfere with what seems to me to be a highly commendable, though admittedly only a first, step toward establishing fairer conditions in respect to railroad passenger rates in New York state than have hitherto existed.

Turning now to the question whether the charge of $2\frac{1}{2}$ cents per mile proposed by the railroad as a new standard rate for ordinary passenger transportation in New York state is unduly high, I shall content myself at this time with saying that I have been entirely unable, from anything in the record of these proceedings, to conclude that this rate would prove excessive or unfair from the standpoint of the public, or that it would be productive of any larger revenue to the railroad company, compared with the expense of carrying on its intrastate passenger business, than the company has a

right to expect from this branch of its activities. This application, it must be remembered, has been made to us virtually under instructions, or at least upon strong suggestions, from the Interstate Commerce Commission, which has taken the position that railways are entitled to an adequate return upon their freight and passenger business considered separately. The Interstate Commerce Commission has itself already permitted The New York Central Railroad Company to raise its rates for interstate passenger transportation to $2\frac{1}{2}$ cents per mile. These rates are now in force between points in New York state and points in other States, and upon such interstate business they apply as well to the portions of the runs which are within the State of New York as they do to the distances outside the State. For instance, a traveler from New York city to Chicago now pays $2\frac{1}{2}$ cents a mile between New York city and Buffalo, whereas an intrastate traveler between these last named points pays the lower intrastate rates now in force. The rate of $2\frac{1}{2}$ cents a mile which the Interstate Commerce Commission permits the railroad to charge upon distances within the State of New York that are included in interstate runs, and which the railroad now asks us to allow upon intrastate business, varies little, if at all, from the average rate which has been recognized more than once by State legislatures, by Federal courts, and by regulatory bodies throughout the United States, as a reasonable uniform rate for passenger transportation. The existing rates — frankly discriminatory in many instances, as I have pointed out — vary, it will be remembered, from 2 to 3 cents per mile. The new rate is less than is being charged by other trunk railroads running out of New York for service comparable in every way with that which the New York Central supplies on the divisions of its system upon which most of the increases will occur under the new schedules. For instance, on the Pennsylvania railroad a single ticket to a point 143 miles distant from New York — the same distance as Albany is from New York on the New York Central — costs \$3.60,

and a round-trip ticket \$7.20. For the same distance on the New York, New Haven and Hartford, a single ticket costs \$3.88, and a round-trip ticket \$7.76. On the Central Railroad of New Jersey the figures are respectively \$3.55 and \$7.05; on the Delaware, Lackawanna and Western, \$3.85 and \$7.05; on the Erie, \$3.60 and \$7.20. As against these figures, a single ticket on the New York Central railroad from New York city to Albany, a distance of 143 miles, now costs \$3.10, and a round-trip ticket \$5.75. Under the readjustment that is proposed, the cost of a single ticket from New York city to Albany would be \$3.58, and of a round-trip ticket \$6.65. I mention this Albany rate as typical of the rates in which the largest increases under the new schedules would occur. The contrast between the proposed new rates on those branches of the New York Central system which would show the largest increases under the new schedules, and the rates for similar service on the other large trunk lines I have named, seems to be especially significant when taken in connection with another fact which has been established in this proceeding — the fact, namely, that the volume of travel between New York and Philadelphia on the Pennsylvania, and between New York and Boston on the New Haven, is very much greater than the volume of travel on the New York Central between New York city and Albany. The cost of the service to the individual traveler ought, one would suppose, be correspondingly less under these circumstances. Instead of that it is greater. A comparison of this sort, while it can not perhaps be regarded as entirely conclusive, corroborates the view (which nothing in the record in this case seems to controvert) that even the largest increases which will result from the new tariffs on the New York Central involve no such obvious injustice to the traveling public of this State as to warrant this Commission in rejecting, upon this ground, the tariffs which have been filed with it.

Personally, I am not greatly alarmed by the suggestion that under these new tariffs the railroad may temporarily

enjoy an opportunity of extracting exorbitant profits from the traveling public. We do not know whether 1915 and 1916 conditions are going to last during the next five or ten years, nor what the cost of labor and material is going to be, nor what will be the effect of the proposed rate readjustment upon the volume of the company's business. We know this, however,—that the more prosperous a public utility company is, the better is the quality of the service which can be insisted upon from such a corporation by the people and by public service commissions. It is in good service, rather than in rates shaved down to the last fraction of a cent, that the public, I think, is chiefly interested. As a regulatory official I should certainly feel much freer, if the present plan of rate readjustment were approved, to insist upon the very highest type of service throughout the entire New York Central system in New York state, than I would if this application were denied. So that, apart altogether from those desirable effects which may be anticipated from the removal of discriminations and inequalities in existing rates, I believe that the public interest will be largely advanced, in better and better service, if the new tariffs are allowed to take effect.

It goes without saying, of course, that if after a fair trial these new tariffs should be found to result in unwarranted profits to The New York Central Railroad Company, they would, in this era of commission regulation, be revised downward very quickly. I, for one, would stand absolutely ready to unite in action of that sort the moment it became obvious that a uniform $2\frac{1}{2}$ cent rate for the transportation of intrastate passengers on the New York Central system in New York state is too high. My position is, that upon the facts before us no sufficient grounds exist for believing that a $2\frac{1}{2}$ cent rate is in anywise extortionate. I can see, on the other hand, where many existing discriminations and inequalities will be eliminated by putting such a rate into effect; and the whole situation would at least be placed, by taking such a step, upon that basis of uniformity which has received the

sanction of law, and which seems to have commended itself, both to practical people and to rate making experts throughout the United States, as on the whole the best working solution of the complicated problem of railroad rate making.

Holding these views, I am compelled with all diffidence to express my dissent from the chief conclusions which my colleagues have arrived at in this interesting and important matter. With one detail of their decision, however, I wish to express myself as in substantial accord. I do not believe that the so called belt line rates between Troy and Albany should be raised. This Troy-Albany situation seems to me to correspond nearly enough with the situation within the commutation zone near New York city to warrant its being treated as a separate and special matter, and I think that the schedules which have been filed by the railroad company on its Troy-Albany branch should be disallowed. In other respects my view is that the new schedules should be given a trial, and corrected if actual experience with them shows that their public disadvantages, in the shape of extortionate profits to the railroad, outweigh the advantages to which I have called attention in the foregoing memorandum.

VAN SANTVOORD, *Chairman*:

There is something attractive, if only as an appeal to the sense of orderliness and symmetry, in the suggestion of a uniform rate of passenger fares throughout the entire sphere of operation in this State of the applicant corporation. But I am unable to accept Commissioner Emmet's conclusion that what he terms the "principle of uniformity" properly may be applied to the precise extent embodied in the schedules under review. To such a determination there are two fatal objections.

Under the provisions of the Public Service Commissions Law and the decisions of the courts, increased rates of an established railroad enterprise can be justified only by the

proven need of additional revenue. The proposition of law involved in this first consideration has been adequately discussed in the prevailing opinion herein; while it is conceded in the dissenting opinion that the need of additional revenue has not been sufficiently established to justify the proposed increased rates.

But even if the foregoing is disputed and this Commission actually is empowered to approve of increases upon grounds other than an established need of additional revenue, the record discloses that instead of recognizing the "principle of uniformity" the proposed rates actually accentuate some of the existing inequalities and discriminations in the passenger tariffs of the corporation. It is in respect of this second objection to Commissioner Emmet's conclusion, and because of a recent and most important construction of the rate making powers of this Commission by the court of last resort, that I feel impelled to observe briefly, as follows.

What is termed the main line of the New York Central railroad extends from Buffalo 297 miles east to Albany, and thence 143 miles south to New York city. In the original charter granted in 1853 to The New York Central Railroad Company, now a part of the recently consolidated corporation of the same name, way fares between Albany and Buffalo were limited to 2 cents per mile, at which rate such fares have obtained to the present time. By chapter 216 of the laws of 1846, way fares between New York and Albany on the Hudson River railroad, now a part of the New York Central railroad, were limited to 2 cents per mile during the Summer and $2\frac{1}{2}$ cents per mile during the Winter — the last mentioned term thereafter legislatively defined to include the months of December, January, February, and March. But in an action to recover penalties for excess fares charged between Spuyten Duyvil and 30th Street station in New York city, the Court of Appeals held that the rate limitation in the act of 1846 had been removed by the General Railroad Act of 1850, chapter 140, section 49 (*Johnson v. H. R. R. R.*

Co., 49 N. Y. 455). Since the year 1909, way fares between New York and Albany (other than in the so called commutation zone near New York city) have been at the rate of substantially 2.17 cents per mile; and it is these fares which are increased to 2½ cents per mile in the schedules under review.

As illustrating the proposition that the new rates tend rather to enlarge existing inequalities than to establish uniformity, the following examples have been formulated:

	<i>From</i>	<i>To</i>	<i>Distance</i>	<i>Present fare</i>	<i>New fare</i>
1. (a)	Albany.....	Amsterdam (west).....	33 m.	\$0.66	\$0.66
	(b) Albany.....	Greendale (east).....	33 m.	0.72	0.83
2. (a)	Albany.....	Little Falls (west).....	74 m.	1.48	1.48
	(b) Albany.....	Poughkeepsie (east).....	70 m.	1.52	1.75
3. (a)	Albany.....	Canastota (west).....	127 m.	2.54	2.54
	(b) Albany.....	Yonkers (east).....	128 m.	2.78	3.20
4. (a)	Albany.....	Syracuse (west).....	148 m.	2.96	2.96
	(b) Albany.....	New York city (east).....	143 m.	3.10	3.58

How does it tend to establish uniformity in rates to increase the fare of a passenger on the Empire State express from New York to Albany, a distance of 143 miles, from \$3.10 as at present to \$3.58 as proposed, while continuing to charge a passenger on the same train only \$2.96 for transporting him to Syracuse, which is 148 miles west of Albany? Why should a passenger traveling on the main line of the railroad east of Albany (called "east" in the corporation's traffic and operating parlance, although the direction from Albany actually is south) pay at the rate of one-half cent per mile more than one traveling on the main line west of Albany? Why should some poor — but honest — lawyer, resident let us say in Yonkers, 128 miles south of Albany, after an unsuccessful attempt to persuade the Court of Appeals that two and two make five, have his declining spirits further assailed by the compulsion of paying \$3.20 (42 cents more than formerly) for return transportation from Albany to the hydropathic gloom of his reproachful hearthstone, while his successful adversary gaily rides back to the acclaim of his client and the admiring plaudits of neighbors at his home in Canastota, a like number of miles west of

Albany, at a transportation charge of only \$2.54? Is it because in the making of rates the "principle of uniformity" must nevertheless not be applied in too absolute disregard of the scriptural allegation, that from him who hath not shall be taken away even that which he hath?

As a more serious answer to such troublesome questions, it is suggested that under existing statutory restrictions the railroad company has at present gone as far as possible in the establishment of a $2\frac{1}{2}$ cent per mile rate for passenger transportation over the various lines of its system; but that if and when it shall be determined that under the decision in the Ulster and Delaware case the charter restrictions as to rates on the New York Central between Albany and Buffalo must yield to the regulatory power of this Commission to permit an increase in such rates, doubtless steps will be taken by the railroad "to equalize disparities between the present Albany-Buffalo rates and the rates on the other divisions of the New York Central system".

Several months before the New York Central tariffs under consideration were filed with this Commission, it had been determined by the Appellate Division that in a proper case (where the need of increased revenue is established) this Commission has authority to permit a railroad corporation to increase its rates beyond a maximum established by general statute (*People of the State of New York ex rel. The Ulster and Delaware R. R. Co. vs. Public Service Commission*, Appellate Div. 171, p. 607). This decision was affirmed by the Court of Appeals May 2, 1916 (218 N. Y. 29), at which time the hearing instituted by this Commission as to the propriety of the rates under discussion had been closed. As far as this Commission is informed, no move has been made by the New York Central to take advantage of the decision in the Ulster and Delaware case in bringing about an equalization of the disparities in rates for transportation of passengers between Albany and Buffalo and between Albany and New York, respectively. Possibly the corporation does not

concede that the decision in question is good law. At least, it is intimated that the railroad has assumed the Commission is without authority to approve an increase in rates which have been fixed by charter; and it has been suggested that the decision in the Ulster and Delaware case might not apply in an attempted increase in rates by the New York Central over the maximum fixed by charter, because in the Ulster and Delaware case it was merely a general law which was deemed repealed or rather modified by implication in another general law: whereas it is urged that such modification or repeal of a special law can be accomplished only by express statute. Apart from its doubtful soundness as an original proposition, the argument falls before the decision of the court of last resort in the Johnson case above cited, where it was held that the maximum fare restriction imposed upon the Hudson River railroad by the special act of 1846 was repealed by implication by the general railroad act of 1850. Plainly, in the mind of the Court of Appeals there is no distinction to be drawn between a special and a general statute in determining whether there has been a repeal or modification thereof by implication found in a general law. In anticipation of the possible rejoinder that questions as to the repeal or modification of charter provisions are not to be determined by the same reasoning applied to solution of similar questions in respect of ordinary special acts, and that rate restrictions imposed in a charter are to be considered as in the nature of a condition to the granting of such charter, from which condition the obligee corporation may be released only by express legislative sanction, it is to be noted that the act of 1846 incorporating the Hudson River Railroad Company was in the highest sense a charter, because at that time there existed no other method of instituting a railroad enterprise than by legislative act. Thus it will be found that no certificate of incorporation of the Hudson River Railroad Company has ever been filed in the office of the Secretary of State.

I am unable to escape the conclusion that under the decisions cited this Commission has abundant authority in a proper case to allow The New York Central Railroad Company to charge in excess of two cents per mile for way fares between Albany and Buffalo, notwithstanding the charter restriction above stated. Should the Commission hesitate to exercise such authority to the point of legalizing a manifest discrimination against a portion of the public simply because "fairly strong considerations" may be urged against what seems to be a common sense application of the principle laid down in the Ulster and Delaware case above cited? The power of the Commission established by the court in that case is in our opinion precisely that which ought to be bestowed upon a regulative body of this sort. And now that this broad jurisdiction in rate making has thus been judicially defined, ought the Commission to stay its hand in dealing out an even measure of justice to all the communities along the main line of this great trunk line system merely because the carrier may have assumed that the Commission has only jurisdiction to dispense partial justice?

If the foregoing conclusions are sound — and it would seem that their acceptance rests upon common respect for the authority of the court — and the Commission accordingly is clothed with full power of approval in the premises, why should not the passenger traffic between Albany and Buffalo share ratably with the traffic between Albany and New York the burden of such increased fares as are required by the financial necessities of the enterprise? Or if, as suggested in the dissenting opinion, need of greater income is not an absolute prerequisite to increased fares, which latter properly may be predicated upon other considerations — such as the "principle of uniformity" — why at least should not that principle be applied impartially, thus distributing the burden attending the accomplishment of this rate making ideal, if such it be, between all travelers on the main line of the railroad? Not impossibly this might be accomplished by fixing

the uniform fare at $2\frac{1}{4}$ cents per mile, under which rate the "trial test" suggested by the Commissioner could be made as satisfactorily as, and with less discrimination than, under the higher rate proposed for the Hudson River division alone.

In fine, if the corporation is actually in need of additional revenue from its passenger traffic; or if, as the prevailing opinion declares, inadequate rates are exacted on the Harlem and Putnam divisions; or if, as implied in certain reductions of existing rates which appear in the proposed tariffs, a revision downward here and there in the existing tariffs is fair and equitable; or if, as so persuasively outlined in the dissenting opinion, absolute uniformity in intrastate rates — outside of recognized commutation zones so called — should be regarded as the *summum bonum*; in short, upon what grounds soever increased rates are to be justified, why should substantially the entire burden of the "readjustment" fall upon people traveling to or from points between Albany and New York on the eastern division of the main line? Under such a one-sided and inartificial application of the principle of uniformity it seems to me that the idea would inevitably arouse a more or less deserved disapprobation at one end of the State; while as the only price for thus being left undisturbed in the unique and splendid isolation of their two-cent zone the dwellers along the occidental division of the road might no longer justly and philosophically observe that "the further we go west the more convinced we are that the wise men came from the east".

In the Matter of the Complaint of JAMES O. MOORE *against* THE PAVILION NATURAL GAS COMPANY, asking that natural gas main be extended to his farm in the town of Leicester. [Case No. 5196.]

Subdivision 1 of section 65 of the Public Service Commissions Law requires a natural gas corporation to furnish service, by extending its instrumentalities and facilities to the premises of an applicant, where it is shown that such extension and service are in all respects just and reasonable.

Upon the refusal of the gas corporation to make such extension, the Commission has ample authority to make an order, pursuant to the provisions of subdivision 2 of section 66 of the Public Service Commissions Law, requiring the company to extend its main and give such service; it having been determined by the Commission that all the requirements of subdivision 1 of section 65 have been satisfied.

Accordingly *held*, that the respondent should be directed to extend its gas main and service from its existing distribution system to the premises of the complainant, it having been made to appear that the complainant is an inhabitant and taxpayer of the town of Leicester; that he would annually use about \$75 worth of gas at the prevailing rate in said town, for domestic and other purposes; that the cost of the pipe for such extension would be from twelve to fifteen cents per foot; that the complainant is willing to pay all expenses of such extension, except cost of pipe and other materials, and bind himself to take such gas for a period of five years; that the respondent has an abundance of gas in said town, and operates two franchises therein, one in the rural part of the town and the other in the village of Moscow; the town franchise authorizes pipe and service lines to be laid in any and all of the highways, and requires the company to furnish gas to users along the highway containing its mains, and the company is now furnishing such service on one highway; the village franchise, among other things, permits the company to lay and maintain pipes and mains in the streets for transportation of natural gas, for any purposes, including the supplying the village and its inhabitants with natural gas. These facts have been established in this case, and fully justify an order for the extension from the distribution system in the village of Moscow, a distance of about one thousand feet.

Decided June 26, 1916.

Appearances:

Norton, Penney, Spring and Moore, Buffalo, attorneys for the petitioner.

James M. E. O'Grady, Rochester, attorney for the respondent.

HODSON, Commissioner:

The respondent in this case challenges the authority of the Commission to make an order requiring a gas corporation to extend its gas mains and service from its existing plant to the premises of a proposed consumer. This is not a special objection relating to the reasonableness of such proposed extension, but is general in its character, and attacks the regulative power of the Commission, which has been frequently exercised, with no thought heretofore that there was any doubt about it. The petitioner is a resident of the city of Buffalo, and owns an extensive dairy and poultry farm in the town of Leicester, Livingston county, which he operates throughout the year, and where he and his family spend the summer months.

The farm buildings are located on a highway leading into the village of Moscow, about a thousand feet away. The dwelling house is occupied all the year 'round by relatives of the petitioner, and natural gas is required by them for both fuel and lighting purposes; while in the various buildings, devoted to the care of stock and poultry, a large quantity of gas would be used. It will not be seriously questioned but that, to satisfy all such requirements, the petitioner would be a profitable customer of a company having gas to sell, and being conveniently located for such service. The respondent also raises the question that, under all the proof in this case, a compliance with the demand of the petitioner would not be such a reasonable improvement and extension of the works . . . lines, . . . and other reasonable devices, apparatus and property of a gas corporation as is contemplated by section 66 of the Public Service Commissions Law.

The Pavilion Natural Gas Company has been granted, and is now operating under, two franchises in the town of Leicester: one granted on the 13th day of September, 1913, by the proper authorities of the town of Leicester, and covering all the highways in the rural part of the town; and the other granted on the same day by the president and trustees of the village of Moscow, which is wholly within the limits of the town of Leicester. This latter franchise authorizes the respondent, its successors and assigns, "to enter upon and use any of the public ways and places in said village for the purpose of laying, repairing and maintaining pipes, mains, branches and conduits for the transportation of natural gas in the said village of Moscow, along all of the public streets . . . and places for the purpose of laying, repairing and maintaining any necessary or proper appliances for supplying said village with natural gas for heating and illuminating purposes, and the transportation of gas from any well owned . . . or operated by The Pavilion Natural Gas Company, *for any purposes, including the supplying of the village of Moscow and its inhabitants with natural gas*"; while the former franchise is a sweeping permit from the town authorities, for the gas company to lay and maintain its distribution and transmission lines in all the public places of the town, for, after reciting that the company had made application for a franchise to lay and maintain pipes within the town of Leicester, upon *any and all of the highways* and bridges therein, the resolution of the town board and town superintendent of highways then provides, that the right is granted and conveyed to The Pavilion Natural Gas Company, its successors and assigns, "to lay, construct and control pipe lines and *service lines*, for the conveying of gas *in said highways* within the town of Leicester, and over and across all streams and bridges in said town for the period of fifty years". When the town officials granted the application of this company to construct and maintain its pipe lines and service lines in any and all of the highways

of the town, it is plain that they intended to authorize the construction and operation of both transmission and distribution lines throughout the town; and if this is a fair construction to be given to the language used, then it must follow that the company has the right to use any highway for the purpose of conveying natural gas to customers within the town, and that no exception can be made of the highway leading to the premises of the petitioner. Substantially, this is the ruling made by the Commission in March, 1916, upon a preliminary objection raised by the respondent in this case. At the time this objection was first presented by counsel for the gas company, a brief was filed with the Commission, and it was therein urged that the franchise through Leicester was only for transmission of gas to the village of Moscow, and that such franchise would not have been sought for any other purpose; but the fact remains that it was sought for other purposes, and was granted by the town officers and accepted by the gas company for the distinct purpose of constructing and maintaining service lines in any and all of the highways of the town, and all this appears by the franchise itself, which is an exhibit in this case. Moreover, the respondent is now maintaining and operating a service line or distribution system in said town by furnishing gas to users along the highway containing its mains; and this leads us to the consideration of another provision of the town franchise which has been the subject of much controversy throughout the trial of this case.

By the third paragraph of the franchise the respondent "covenants and agrees to sell and furnish to all of the said inhabitants of the town of Leicester, in front of whose premises such gas mains shall be laid, such gas as said inhabitants may require for lighting, heating and manufacturing," for a stated price, and so long as the supply of gas can be obtained. This is taken by the respondent as a basis for the claim that by the inclusion of a certain class of the inhabitants who are to be favored with gas service, it is intended to

exclude all others. We are not in accord with this contention. The language of the franchise does not justify any such conclusion, and the Public Service Commissions Law would not permit it. Otherwise it would be within the power of the gas company to discriminate in favor of or against the inhabitants of the town, contrary to the terms of the franchise, and in direct violation of the agreement of the company. In other words, when the town authorities entered into this franchise-contract with the gas company, they represented all the inhabitants of the town with reference to gas service, and it can not be that the respondent has the power to break down public regulation of this utility by merely determining that it will not operate a service line except in such highways as it may arbitrarily select, and thus deprive other localities from enjoying like privileges, who are able to show that their demands as to such service are in all respects just and reasonable.

It appears, therefore, that under the broad provisions of the franchises now possessed and operated by the respondent in the town of Leicester, any inhabitant of the town may properly ask for an extension of the gas mains and service to his premises, and it only remains for the Commission to determine the reasonableness of such extension; but in this connection, we must also pass upon the further point which has been raised by the respondent, that this Commission is without jurisdiction to make an order requiring any extension of the distribution system of a gas company, because the words "mains" and "pipes" are not included in the law which authorizes the Commission "to order reasonable improvements and extensions of the works, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations"; and the argument is made that the Legislature never intended that the mains and pipes of a gas company should be comprehended by the language used. This objection is so startling and novel that it commands our particular attention, and requires a

Careful examination of the law relating to the subject, to the end that a correct ruling may be made in this matter, and that it may be ascertained and definitely determined whether the established practice of this Commission, which has been followed for nearly nine years, is or is not authorized by law.

Section 62 of the Transportation Corporations Law provides that gas must be furnished and mains extended to premises within one hundred feet of an existing main. This is a specific requirement for the extension of mains and service under certain circumstances. This statute is silent as to any such extension beyond the limits of one hundred feet; and for any such additional extension, or even the enforcement of the requirement for extending one hundred feet, authority must be found in the statute, for it will not be claimed that this Commission could make such an order unless that power has been delegated to it by the Legislature.

Turning now to subdivision 1 of section 65 of the Public Service Commissions Law, we find that it is provided that "every gas corporation . . . shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate, and in all respects just and reasonable"; and under subdivision 2 of section 66 of the same law, it is clear that complete authority is vested in the Commission to carry out the provision and enforce the requirements of section 62 of the Transportation Corporations Law and subdivision 1 of section 65 of the Public Service Commissions Law; this authority is found in the provision that "the Public Service Commission has power to order reasonable improvements and extensions of the works . . . lines, conduits . . . and other reasonable devices, apparatus and property of the gas corporations".

Under the provisions of the Transportation Corporations Law, the Commission is no more limited to an extension of one hundred feet, which that law requires a gas company to make, than its jurisdiction is confined to the few gas users

along a single highway in which the gas company now operates its franchise in the town of Leicester.

The two situations thus presented are quite analogous. In the case of an extension required by the Transportation Corporations Law to customers living within one hundred feet of an existing main, the Commission has the undoubted authority to order such extension by a gas company, where such company has failed to make the same voluntarily, and this, too, without any necessity for proof as to the reasonableness of such extension, because the law has fixed and determined the rights of the parties. Likewise, the same provision of the Public Service Commissions Law delegates the power to this Commission to order *any* reasonable improvements and extension of the works, lines, apparatus and property of a gas corporation, and this would comprehend any locality beyond the one hundred feet limitation; but in such a case, it will be noted, the extension can not be ordered until it is found to be reasonable. This principle has recently been declared by the Supreme Court, First Department, and must be deemed the settled law of the State. (*The People ex rel. N. Y. and Queens Gas Co. v. McCall and others*, 171 A. D. 580.)

Under the terms of the Leicester franchise, the respondent is obligated to furnish gas to all applicants along a highway occupied by its mains; but suppose the company refuses to give such service, then, obviously, it becomes the duty of the Commission, if requested, to compel such service. These are services which the company is bound to give, without any further proof than that it is neglecting to comply with the plain provisions of the franchise. But in the case of another inhabitant of the town, like the petitioner, who lives on a highway not used by the gas company, the Commission is clothed with the same power to order an extension, but with this difference,—the applicant must show and the Commission must determine that the same is, in all respects, just and reasonable. And right here we are confronted with the

further objection of the respondent, that the petitioner has not met the requirement of the Public Service Commissions Law just referred to, that the burden is upon him to show that his request is a reasonable one.

It is true that before an order can be properly made directing an extension of gas mains and service, such as the petitioner requires in this case, certain facts must be presented to the Commission which fairly satisfy the requirement of the statute as to the reasonableness of such extension; and it may be stated that an applicant is usually expected to furnish proof of such facts. In the present case, it clearly appears from the petitioner's showing that his farm buildings are about a thousand feet from the Moscow distribution system of the respondent, and something over a mile from the highway occupied by the transmission line of the company, along which line the respondent now serves its customers with gas; that he is a taxpayer in said town and one of the inhabitants; that he would annually use about seventy-five dollars' worth of gas at the prevailing rate of forty-five cents per thousand, for domestic and other purposes; that he has endeavored for two years to obtain gas service from the respondent, but without success; that it would cost between twelve and fifteen cents per foot for the pipe necessary for any such extension, and cost about five cents per foot to lay the same; that the petitioner is willing to pay for all ditching, laying, and filling, and all other necessary expenses in making the extension from the Moscow mains, except the cost of the pipe and other materials; and also offers to bind himself to take gas from the respondent as above stated for a period of five years; and that the company has an abundance of gas in said town.

Apparently the petitioner assumed the burden thus put upon him, and has willingly borne it, although it is believed that the load was not a particularly heavy one to carry; but whether heavy or light, and no matter if the petitioner stands alone in making the necessary proof, the above array of

salient facts, which we hold have been sufficiently proved in this case, meet the requirement of the statute as to reasonableness of service, just as effectively as though a cloud of witnesses and a flood of testimony had been produced, for, in the last analysis, it is the quality of evidence, and not the quantity, which determines its value.

Opposition was made by the respondent to any extension leading out of the village of Moscow from the mains of the gas company in that village, and it was claimed that such extension would necessarily include a "dead end" to the main where such service terminated; this appears by the testimony of the company's manager, who also stated that in his opinion such a condition would result in condensation and other troubles which would find reflection on the Moscow service. But it must be apparent, and such witness conceded, that the same situation exists in any streets of the village where an extension is made for a considerable distance with a single line of pipe. This method is employed by gas companies generally, and, indeed, is used by the respondent in this very village, but the Commission has not been informed that any trouble ensues from such practice; and inasmuch as this course seems to be the proper one to follow in cases like the present one, the duty would clearly devolve upon the gas company to install such appliances as would obviate any trouble.

Under all the facts and circumstances of this case, the Commission finds and determines —

First: That under the provisions of the franchise from the town of Leicester, the petitioner is entitled to have service of natural gas by the respondent.

Second: That subdivision 1 of section 65 of the Public Service Commissions Law requires the respondent to furnish such service by extending its instrumentalities and facilities to the premises of the petitioner, provided it is found to be just and reasonable.

Third: That the request of the petitioner herein has been shown to be in all respects just and reasonable.

Fourth: That subdivision 2 of section 66 of the Public Service Commissions Law confers upon this Commission ample authority to make an order requiring the respondent to extend its main and give such service to the petitioner.

Fifth: That the respondent should be directed to extend its gas main and service from its system in the village of Moscow, along the public highway to the lands and premises of the petitioner in the town of Leicester, a distance of about one thousand feet; such extension to be commenced on or before July 15, 1916, and to be completed on or before July 29, 1916,—on condition, however, that the petitioner file in the office of the respondent in LeRoy, N. Y., on or before July 10, 1916, a written statement or agreement whereby the petitioner shall obligate himself, his successors and assigns, to take the service of natural gas from the said extended main of the respondent for a period of at least five (5) years, and pay therefor the prevailing rate or price in the town of Leicester, and will do or cause to be done all work necessary for such extension, or reimburse the respondent for all expenditures therefor, except the cost of pipe and other materials; and an order will be entered accordingly.

All concur, except Commissioner Carr not present.

In the Matter of the United Traction Company's Proposed
New Passenger Fares and Charges, and Regulations and
Practices Affecting Such Fares and Charges. [Case
No. 5363.]

The United Traction Company, operating electric street railways in and between Albany, Troy, and neighboring communities, filed a tariff increasing the fare between Albany and Troy from ten to fifteen cents, and increasing fares between Albany, Troy, and certain intervening points from five to ten cents. A suspension and investigation order was entered in accordance with chapter 240 of the laws of 1914. The respondent defended the proposed increase on the ground that its revenues on its entire system were insufficient to enable it to earn a fair return, and that the selection of this particular route for an increase was a matter within the managerial discretion of the company.

Held: 1. That the respondent had failed to show that the particular line concerned was unprofitable taken by itself or by comparison with other lines.

2. The evidence disclosing that the proposed increases would so operate as to impose upon passengers on this line from two to three times as high a fare as is imposed upon passengers upon other lines of the company for as great or greater distances, a discrimination was established which was unlawful unless justified by the respondent.

3. That the respondent failed to justify such discrimination.

4. It seems that section 181 of the Railroad Law, restricting street railways from charging passengers more than five cents for a continuous ride from point to point within the limits of an incorporated city, is no longer operative where the street railroad company can show that at the statutory rate it is unable to earn a fair return.

5. One class of patrons may not be subjected to a rate in itself unreasonably high in order to recoup losses sustained in serving other classes at unprofitable rates even if the unprofitable rates are imposed by law.

Decided June 26, 1916.

Appearances:

H. T. Newcomb, Washington, D. C., and *Townsend K. Wellington*, Albany, N. Y., for the United Traction Company.

288 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

William E. Woollard, 73 State street, Albany, N. Y.; *Edwin T. Coffin*, Arkay Building, Albany, N. Y.; *Julius Ilch*, Albany, N. Y.; for the Albany Chamber of Commerce.

Albert J. Danaher, 82 State street, Albany, N. Y., Corporation Counsel City of Watervliet.

Joseph J. Wallace, 12 Lyon Block, Albany, N. Y., for James C. Fitzgerald.

John P. Judge, Troy, N. Y., for City of Troy.

Edward A. Mealy, Cohoes, N. Y., for City of Cohoes.

C. T. Dolson, 74 Chapel street, Albany, N. Y., for Schuyler Park Improvement Association, Watervliet, N. Y.

H. J. Goldman, 22 Brookside, Menands, N. Y.; *Dr. W. G. Ryon*, 17 Lyon avenue, Menands, N. Y.; *P. L. Ball*, Menands, N. Y.; *William J. Thomson*, 6 Brookside, Menands, N. Y.; *Floyd A. Lane*, 26 Brookside avenue, Menands, N. Y.; for Menands Improvement Association.

Harry C. Wardell, 1734 Seventh street, Rensselaer, N. Y.; *Walter M. Bates*, 12 Chestnut street, Rensselaer, N. Y.; for the Rensselaer Board of Trade.

Clark A. Waterbury, 1640 Broadway, Rensselaer, N. Y., President Rensselaer Board of Trade.

Prentiss Carnell, 495 State street, Albany, N. Y., for the Albany Business College.

William C. Gloeckner, 97 State street, Albany, N. Y., for residents of Cemetery avenue.

John P. Dormer for National League of Government Employees.

John H. Reinech, 368 Second street, Albany, N. Y., for Watervliet Arsenal employees.

L. D. C. Woodward, Watervliet, N. Y., for Watervliet Chamber of Commerce.

Edward L. Kellogg, 31 Menands road, Menands, N. Y.

John D. Johnson, Troy road.

J. D. Fitzgerald, Watervliet, N. Y.

Gertrude H. Wilsey, 50 Glenwood road, Kenyon Park.

Mrs. William E. Bigg, 35 Glenwood road, Kenyon Park.

Mrs. J. N. Van Dycke, 33 Glenwood road, Kenyon Park.

Miss Weare Coffin Little, Forest Hill, Menands, N. Y.

P. C. Dandurand, Cohoes, N. Y., for Cohoes Business Men's Association and Board of Trade.

IRVINE, Commissioner:

The United Traction Company, operating electric street railways in the cities of Albany, Rensselaer, Troy, Watervliet, and Cohoes, the villages of Waterford and Green Island, and in intervening territory, filed, to become effective January 1, 1916, a tariff (P. S. C., 2 N. Y., No. 9) changing and for the most part increasing its rates between Albany and Troy and intermediate points. A number of complaints having been filed with the Commission an order was made December 30, 1915, suspending the operation of the proposed tariff and for an investigation of the reasonableness thereof.

There are two main divisions of the United Traction Company system: one embraces the cities of Albany and Rensselaer; and the other the city of Troy and adjacent territory, including the cities of Watervliet and Cohoes, and the villages of Waterford and Green Island. There is also a line of track west of the Hudson river from Albany through Watervliet to Troy, and it is to this line that the proposed tariff applies. Cars are operated from the Plaza at the foot of State street in Albany northerly to the city limits, thence to Watervliet, and by means of a loop to and through a portion of the city of Troy, the southern part of the loop crossing the Hudson river at Congress street in Troy, and the northern at Green Island. Cars are also operated from Albany to Cohoes. A rate of five cents prevails throughout the city of Albany, and passengers are carried beyond the city limits to a point known as Schuyler Bridge at this rate. Schuyler Bridge is at or near the southern boundary of Watervliet. A five-cent fare also prevails throughout the Troy division, and passengers are carried at that rate on the line in controversy south to a point known as Garbrance Lane, not far from the north city line of Albany. A rate of

ten cents prevails between points north of Schuyler Bridge and south of Garbrance Lane. Transfers are given to passengers boarding cars south of Schuyler Bridge to any other line in the city of Albany, and so in the reverse direction from any line in the city of Albany to Schuyler Bridge. Transfers are given from any line in the Troy division which will carry a passenger to Garbrance Lane, or from Garbrance Lane over any line in the Troy district. A passenger going in either direction may avail himself of the initial transfer privilege and by payment of ten cents additional complete his journey and obtain a transfer privilege on the other division.

The proposed tariff abolishes the overlapping area between Garbrance Lane and Schuyler Bridge and creates three so called zones: one comprising the city of Albany, the city of Rensselaer, and a short distance from the north limits of Albany to Garbrance Lane; another the cities of Troy, Watervliet, and Cohoes, and the villages of Waterford and Green Island, and adjacent territory; a third the stretch between Schuyler Bridge and Garbrance Lane. In each of these zones it is proposed to charge a fare of five cents with transfers in both the Albany zone and the Troy zone. The effect is to make the tariff between Albany and Troy fifteen cents with transfer privileges at both ends as against ten cents with the present one end transfer privilege, and to make the fare between the intervening zone either to Albany or to Troy and adjacent communities ten cents. Disregarding the transfer privileges, this is an increase of 50 per cent on the Troy-Cohoes-Albany road, and 100 per cent between either Troy or Albany and the intervening territory. The distance from the Plaza loop to Franklin square, Troy, which may be taken as the limit of the Albany-Troy line, is 7.33 miles. The distance between Garbrance Lane and Schuyler Bridge is 2.4 miles. The distance from the Plaza in Albany to Garbrance Lane is about three miles, and it is something over two miles from Schuyler Bridge to Troy. From Garbrance Lane north the line is through the city of Watervliet

to the city of Troy. From Garbrance Lane south it is largely through a thickly built part of the city of Albany. Between Schuyler Bridge and Garbrance Lane is a thickly peopled district but the conditions are hardly urban. The general conditions of operation on the Albany and Troy line are interurban rather than urban.

This proceeding is governed by section 29 of the Public Service Commissions Law as amended by chapter 240 of the laws of 1914, and the burden of proof is upon the carrier to show that the proposed increase in rates is just and reasonable. The company to sustain this burden offered voluminous testimony tending to show that, taking its system as an entirety, its revenues have for several years been decreasing while its operating expenses have been rapidly increasing; that in 1915, while it had an operating income of \$215,532.59, there was, after paying interest, rents, charges for track and terminal privileges, and hire of equipment, a deficit of \$219,929.39. Deducting from such deficit the income received from the Hudson Valley Railway Company, owned by the respondent, left a total net deficit of \$71,596.06. From these and other figures presented it is contended that increased revenue is essential to the prosperity of the company, and it is for that reason, and that reason alone, that it is proposed to increase the Albany-Troy line rates. It is estimated that the proposed increase will yield from \$100,000 to \$104,000 per year.

We quote from the brief of the company all that relates to the selection of this particular schedule as a means of increasing the company's revenue:

It is submitted that the reasonableness of the company's effort to obtain additional revenue has been fully sustained. This being the case and no attempt having been made to show that the particular changes suggested by the suspended schedule would produce unjust discrimination, no suggestion that such discrimination would result having been entered, it follows that the particular adjustment sought is within the reasonable managerial discretion. The particular changes proposed were determined upon from practical considerations. [Hewitt, 97.] Counsel for protestants admits the "necessity" of looking to this interurban travel for the needed additional revenue. [Record, 233.]

We can not find that counsel made such an admission, but that is immaterial. This is an investigation by the Commission and the Commission is not bound by admissions made by counsel voluntarily assisting.

Following is the testimony of Mr. Hewitt referred to:

Q. Now, Mr. Hewitt, the proposed increase on the Troy-Albany line, is this attempt to increase the rates the result of any scientific study you have given the subject?

A. Yes, sir. Not myself alone, but others with me. I won't say scientific study. It was a practical study.

Q. A practical study?

A. Nothing scientific involved in it at all.

This is as far as we can recall or ascertain from the record the only direct testimony on the subject. There is no evidence as to the value of the property employed in the Albany-Troy service or indeed as to the value of the property employed in the entire service rendered by the company. There is no specific evidence as to the cost of operation of the Albany-Troy line. The auditor of the company testified that the gross earnings are possibly greater than the gross earnings on other lines. The accompanying table prepared from the reports of the company filed with the Commission presents more definite evidence upon the relative earnings of the Albany-Troy line and the other lines of the company:

From this table it appears that the revenue per car-mile on the Troy-Albany lines was greater from 1910 to 1914 than the revenue per car-mile either on the Albany division or the Troy division. In 1914 and 1915 the revenue per car-mile was slightly less on the Albany-Troy line than on the Albany division but much greater than the revenue on the Troy division. An inspection of the table shows conclusively that the losses, if any, are not because of the Albany-Troy operation.

As to the cost of operation, the company keeps no accounts distributing such costs among its different lines and there is therefore no specific proof. Cars run at higher speed on a large part of the Albany-Troy line than on other lines. It

may be assumed that this has a tendency to increase some operating costs: as for power, maintenance of way and equipment. On the other hand, a large part of the line is constructed with T rails, the first cost of which is less than that of groove rails used in the cities. On a large part of the line there is no pavement and no probability of paving in the near future. The higher speed effects a considerable reduction in platform expenses so that, on the whole, it seems more than probable that the operating expense per car-mile is less than on the urban lines. The inevitable conclusion is that this route was not selected for an increase of fare because it was unprofitable at present fares or less profitable than other lines.

It is said that as no suggestion has been made that unjust discrimination would result from the proposed tariff its establishment is within the managerial discretion of the company. In order to establish discrimination it is not necessary that any witness should use the word. While the character of the travel is interurban there are large numbers of people living in the Troy district whose business is in Albany. There are those in the Albany district whose business is in the Troy district. In the intervening zone between Garbrance Lane and Schuyler Bridge practically the entire population has occasion to go to Albany or to Troy in the same manner and for the same purposes that others go from one part of Albany to another part of Albany or from one part of Troy to another part of Troy. The evidence as to the increased expenses shows that they are very largely due to heavy expense for paving and re-paving and for re-laying tracks in Troy and to a greater extent in Albany. In Albany or in Troy, one, on a five-cent fare, may ride 7 miles without a transfer and 9.24 miles in the same general direction with a transfer. By a circuitous route it is possible to ride 10.63 miles. In view of what has been shown as to revenues and probable expenses, how can it possibly be contended that there is no discrimination in charging three times as much for a distance of 7.3 miles as is charged for 7 miles or 9 miles or 10 miles, and twice as much between the Schuyler Bridge

and Garbrance Lane district and Albany or Troy, a maximum of about 5 miles, as is charged for those other distances in the Albany district or the Troy district? These are certainly discriminations, and if they are not unjust discriminations the duty devolved upon the company of presenting evidence to justify them. The record is absolutely barren of such evidence. Possibly underlying the reason for selecting this particular route for an increase of fares is the statute (Railroad Law, section 181) which on its face restricts street railroads from charging any passenger more than five cents for a continuous ride "from any point on its road . . . to any other point thereof . . . within the limits of any incorporated city or village". This statute by its terms does not apply to passengers between different communities in the Troy district or to passengers between Albany and Rensselaer. Moreover, in view of the recent decision in *People ex rel. U. & D. R. R. Co. v. Pub. Serv. Comm.*, 171 A. D. 607, affirmed on the opinion of Cochrane, J., below in 218 N. Y. 29, it seems that the restriction is no longer operative in any case where a company can show that at the statutory rate it is unable to earn a fair return. In the view we take of the case we need not determine whether the company has shown such fact. We have no evidence as to the value of its property, and an inquiry into its proper operating expenses and interest charges would be a long and, in this case, an unnecessary task. Contestants present an elaborate argument attacking the company's calculations in many respects.

Finally, even if the statutory restriction applies and the company is not earning a fair return, it does not follow that this increase should be permitted. One class of patrons may not be subjected to a rate in itself unreasonably high in order to recoup losses sustained in serving other classes at unprofitable rates. It can make no difference in this respect that the unprofitable rate is imposed by law. The company rather than its patrons must bear the burden thereof. Comparisons are not of great value in such matters, but it may be remarked that two situations in the State most nearly analo-

gous to the Albany-Troy service are the service given by the New York State Railways between Rochester and Charlotte, and between Utica and Whitesboro. Passengers on the Rochester-Charlotte line may ride 10.35 miles for ten cents. Passengers on the Utica-Whitesboro line may ride 10.39 miles for five cents. On the Warren and Jamestown railroad, passengers are carried between Frewsburg and Jamestown, a distance of about 6 miles, for ten cents. Frewsburg is a small village and a large part of the intervening territory is practically unpeopled. If a fifteen-cent charge between Troy and Albany would not be unreasonably high, a ten-cent charge is certainly not unusually low.

All concur.

CARR, *Commissioner*, concurring:

I believe that the entire city of Albany should be considered as one zone in which a five-cent fare should apply. The limit of this zone should be the northerly boundary of the city of Albany. There should be an intermediate or so called interurban zone which should extend from the northerly boundary line of the city of Albany to the southerly boundary line of the city of Watervliet, in which a five-cent fare should apply. There should be another zone comprising the present territory operated by the Troy division, namely Troy, Watervliet, Green Island, and Waterford, in which a five-cent fare should apply. A passenger should be entitled to ride for ten cents on a through car going from the loop or terminal in the city of Albany to any point in Troy reached by this direct line. If a passenger desires to ride from any point on the Troy division and transfer to the direct line and ride to the point of destination of the direct line in the city of Albany, he should pay five cents on the Troy city line and ten cents on the interurban, and *vice versa* with respect to passengers going from some point on the Albany division and transferring to the interurban line for Troy. A passenger from the intermediate or interurban zone so called should be

entitled to ride for five cents from any point in that zone to any point in the city of Albany or in the city of Troy reached by the direct line, but should not be entitled to a free transfer for this five-cent fare which would take him to other points in the city of Albany or to points on the Troy division. I believe that this is a fair arrangement of these rates and that it would not work any hardship upon the public in any respect. I also believe that it would give the Traction company a reasonable return for the service which it performs.

Another thing which should be borne in mind in connection with this case is that in the city of Albany particularly, the Traction company is as a whole giving more service than its earnings justify. Whether this is due to the fact that it runs cars on a close headway during the non-rush hours as well as during the rush hours, I can not state. It may be that the people in the city of Albany could get better service in the city of Albany than they get now with a considerable less number of car-miles per mile of road. The figures show that the car-miles per mile of road in the city of Albany are considerably more than 60 per cent higher than any other road in the State of New York outside of the metropolitan district. If a thorough rearrangement of service could be made in the city of Albany, it is possible that much better accommodations could be given to the public at a lower cost to the Traction company.

In the Matter of the Complaint of RESIDENTS OF THE HAM-
LET OF WEST FALLS, town of Aurora, Erie county, *against*
BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COM-
PANY, as to location of new station building proposed to
be built. [Case No. 4942.]

The Buffalo, Rochester and Pittsburgh Railway runs substantially north and south through the westerly part of the town of Aurora, where it has maintained a station upon its own property for many years in the hamlet of West Falls. Two years ago the station building burned and the railroad company prepared plans for rebuilding the same. At about the same time several residents of the community petitioned the Public Service Commission to require the railroad company to change the location of its station, on the ground that the old site was inadequate for the proper facilities of such station and station lay-out. Other residents protested against such change. For a long time, while these proceedings were pending and hearings were held, the railroad company maintained a neutral attitude in the matter, desiring to have the people of West Falls come to an agreement as to the station location, but they remained about equally divided on that question. The proponents of the new site have tendered to the railroad company without cost a well located lot of land consisting of about two acres, and are willing to bear the entire expense of a new public highway and sidewalk leading to the new site from a state highway. Such new site is about a-quarter of a mile from the old site, measured along the railroad, and about one-half mile by way of the highways. The old site is located on the brick state highway.

At the last hearing in this case, the railroad company filed plans for extensions and improvements to the old site which will render the same adequate and convenient for the company and the traveling public.

All these facts and circumstances have been carefully considered by the Commission, and it is *Held*, that the company itself has the first right to determine upon the location of its station, provided, always, that the requirements of section 50 of the Public Service Commissions Law are fairly complied with; and this is so, even though the Commission is satisfied, for sentimental or other reasons, that the station should go to another place; the provisions of this statute are absolutely controlling in this case, for it is there that the Commission finds its only authority to intervene in matters of this kind; "convenience to the public" and "adequate service and facilities for the transpor-

tation of passengers and property" are the only subjects of inquiry delegated to the Commission; and although they are simple in statement, they are broad and comprehensive in their scope, and are of such paramount importance that all other questions must be considered as relating to non-essentials.

Also Held, that the Commission should approve the determination of the railroad company to utilize, extend and improve its present station site according to the plans thereof filed with the Commission, and the application that the station be moved to the new site is accordingly denied.

Decided July 26, 1916.

Appearances:

Kellogg & Baker (Francis F. Baker, of counsel) and *Philip A. Sullivan*, Buffalo, attorneys for the petitioners for new station site.

Clinton, Clinton & Striker (George Clinton, Jr., of counsel), Buffalo, and *C. S. McDougall*, West Falls, attorneys for the petitioners for old station site.

William C. Holmes, *Hoyt Henshaw*, *Nelson P. Hinkley*, and *M. L. Doty*, of West Falls, petitioners for and against the change.

Havens and Havens (Samuel M. Havens, of counsel), Rochester, attorneys for Buffalo, Rochester and Pittsburgh Railway Company.

Hodson, Commissioner:

The Buffalo, Rochester and Pittsburgh Railway runs substantially north and south through the westerly part of the town of Aurora, Erie county, and has two stations in that territory, known as West Falls and Jewettville, which are about a mile apart measuring along the track. West Falls is a small unincorporated village containing several hundred inhabitants, many of whom are summer residents only, who do business in Buffalo, and rely upon the trains of such railway company in traveling between West Falls and Buffalo, a distance of about seventeen miles. Such train service is

very satisfactory to the commuters, as well as to those who permanently reside in the locality of the station sites, which are under consideration in this case. As a matter of fact, such service has become so reliable and satisfactory that it is a very material factor in the rapid growth and development of West Falls as a place for suburban homes of people who do business in the city of Buffalo. The railway company has maintained station facilities at West Falls for many years, and its business there, both passenger and freight, is quite considerable. The station building was destroyed by fire about two years ago, since which time the company has utilized a freight car for station purposes on the site of the old building. New conveniences must be provided for the traveling public, and the company has been ready for some time to construct a new station building, the plans for which everybody in the village seems to approve; but the same has not been proceeded with because of a controversy between the patrons of the road, who are seriously divided on the question of the location of the new station.

The company prepared the plans for the new building without being urged by anyone, but halted the work as soon as it was requested to give a hearing as to a change of site, although everything was in readiness to proceed with such new building and the general station lay-out on the old site. Hearings were given, public meetings were held, and negotiations were had by the proponents of a new site, to which opposition was made by those in favor of the old site. The two sites are not more than a-quarter of a mile apart along the railroad track, but are about a-half a mile from each other by way of the public highway.

While these proceedings were going on, the railway company refrained from taking any steps toward constructing a new station; and on May 4, 1915, a petition, signed by eighty people, who describe themselves as patrons of the respondent at West Falls, was filed with the Commission, asking that the new site be designated by the Commission,

upon which the company should be required to build its new station, alleging, among other things, that the ground therefor had been donated to the company, and that such location is more central, and better facilities can be provided there than at the old site. In due time, the company filed its answer with the Commission, and, although such answer set out facts which made an issue of the allegations of the petition, and asked that the petition be denied, the company postponed such improvements until the case could be heard and determined; and it must be said that the same fair and neutral attitude has been maintained by the respondent during the pendency of this case and at the several hearings until after the contending parties had rested their case at the hearing at West Falls on the 19th day of July, 1915. On more than one occasion, however, the representatives of the railway company have expressed their preference for the old site, believing, as they say, that the old location being on an improved highway and having been established for many years, with its passing and loading sidings, and station appurtenances, the change would entail great and unnecessary cost to the company, and inconvenience to a large number of the people of West Falls; these and other features of the scheme proposed by those in favor of the new site, have been carefully considered by the engineering, operating and traffic departments of the railway company, and they have all determined, as stated in the answer, that the station should be built on the old site. And yet, in the face of all this, the company, with an apparent desire to serve the best interests of the people of West Falls, was represented by its counsel and officials at all of the hearings before the Commission, and did not take any formal position for or against the claims of either party until the hearing at Buffalo, June 23, 1916. The proof presented by the parties at the first and second hearings tended to show that the property of the railway company, constituting the old site, is not large enough nor wide enough for a convenient and adequate station lay-

out; that it is triangular in shape, and located between and at the junction of the railway tracks and the brick highway; the greater part of it slopes down to the highway at a considerable grade, which renders it inaccessible from the lower side, unless a passageway should be constructed up the embankment, the elevation of which is about seventeen feet above the surface of the highway, at the point where it is proposed to build the new station. These matters were pointed out by the Commissioner in charge, who stated that, for these and other reasons, the Holmes site is preferable to the old one, but that, in the matter of access to the station by public highways, the old site has the preference because it is convenient to an improved state road, while there are no such means of reaching the proposed new location. Considerable discussion then followed as to the construction of new highways, one to continue the present town road from the brick pavement up to the Holmes site, and another to be built along the tracks, between such site and the crossing, connecting such new locality with the state highway from the north, and thus making it possible to reach such new site from two directions and over public passageways. When this plan was proposed there was no objection raised by the respondent; indeed, there was substantial acquiescence by all the interested parties, except those residents of West Falls who are insistent upon the retention of the station as now located. Later, it developed that it was impossible to obtain rights of way for the north and south road along the railway, and that part of the plan was abandoned; but a written offer was filed with the Commission on behalf of those favoring the Holmes site, whereby a plot of two acres of land was tendered free to the railway company for the site of the new station and grounds, and they also bound themselves to construct a good road and a sidewalk from the brick pavement to such station, all at their own expense.

At this point the chief of the division of steam railroads of this Commission made a study of the whole situation with

reference to all the questions bearing upon said station location, including the necessity and convenience of the traveling public, as well as the duties and responsibilities of the railway company, as a common carrier, to satisfy the same; a report thereof has been filed with the Commission, from which it appears that personal examination of both sites and the surrounding territory was made, and the probable requirements of the future, as well as the needs of the present, were given careful consideration.

This report concludes with the statement that the construction of the north and south highway does not seem necessary to give proper ingress and egress to and from the Holmes site, providing the new road is extended westerly from the brick highway to such site, and accepted by the town as a part of its system of highways; and in case that is done, a preference is expressed for the Holmes site. These views, except as to such north and south highway, coincide substantially with the opinion expressed by the Commissioner at the West Falls hearing, and which fairly reflected the attitude of the representatives of the respondent at that time; there can be no doubt as to the correctness of that conclusion, under the then existing circumstances, and proceeding upon the theory that the old site was then inadequate for station purposes both as to the necessities of the railroad company and the convenience of the traveling public. But a change has occurred with reference to the situation at the old site, and the respondent now claims that additional land has been procured and a new and improved layout has been planned, whereby all doubt concerning the adequacy of such site has been removed. If this is true, then this case must come to an end, and the Commission can not do otherwise than sustain the railroad company in its decision to utilize the old site for the station; because, the company itself has the first right to determine upon the location of its station, provided, always, that the requirements of section 50 of the Public Service Commissions Law are

fairly complied with. And this is so, even though the Commission is satisfied, for sentimental or other reasons, that the station should go to another place. The provisions of this statute are absolutely controlling in this case, for it is there that the Commission finds its only authority to intervene in matters of this kind. "Convenience of the public" and "adequate service and facilities for the transportation of passengers and property" are the only subjects of inquiry delegated to the Commission; and although they are simple in statement, they are broad and comprehensive in their scope, and are of such paramount importance that all other questions must be considered as relating to non-essentials.

It, therefore, becomes necessary to carefully consider the additions and improvements made and contemplated by the railroad company at the old site, so that it may be intelligently determined whether or not the requirements of the Public Service Commissions Law have been fairly met and satisfied.

As has been stated, the respondent maintained a listening attitude at all the hearings in this case before June 23rd, hoping, as was announced by its counsel, that this controversy might be adjusted by the people of West Falls along the line suggested by representatives of this Commission, notwithstanding the fact that a change in the location of the station, as proposed, was contrary to the judgment of all the officials of the railroad company, and particularly its engineering department, and would also require an additional expenditure of \$3800 if the station went to the Holmes site, even though a large plot of land was generously donated to the company for station purposes. But the people of the neighborhood continued to be divided on the subject, and it seemed necessary that the company should take a decided stand in the matter, although its counsel and officials had, by its answer and by other communications to the Commission, expressed a preference for the old site. This was particularly emphasized at the last hearing in this case, when

proof was offered by the respondent showing that a considerable addition had been made, or was about to be made, to the land constituting the present site of the station and its layout. It appears from such proof that sufficient land has been purchased so that the new station, as planned, will be seventy-five feet farther from the crossing than the point where the old building stood, thus obviating the necessity for standing trains to occupy any part of the highway crossing; under the old arrangement there were no conveniences for teams to reach the station except by entering the grounds from the junction of the railroad and highway, while the present plans provide for the construction of a good roadway at least twenty-two feet wide, to leave the state highway at a point fifty feet south of the crossing, and, with a grade of only seventy-five hundredths of one per cent, skirt the embankment and wind around to the station platform, and to be protected by a standard highway guard-rail; heretofore there has been no way for foot passengers to reach the station except to climb the bank from the state highway or enter the station grounds from the crossing, but the company now proposes, in addition to such new roadway, to construct a cement walk six feet wide from the brick highway to the southerly end of the station platform; this walk will have a uniform grade of seventeen per cent, and may be laid at that grade throughout, or be divided into sections of levels and steps; in front of the station it is intended to have a brick platform twelve feet wide and about three hundred feet long, and between the station building and the edge of the embankment there will be a space of more than thirty feet, the outer border of which will be protected by a substantial guard-rail; a large area about sixty feet square has been set apart for vehicles, and this is located next to the freight room, while the passenger waiting room, nineteen feet square, is in the northerly end of the building; the team track is across the highway, and objection was made at one of the hearings that in order to reach the team track it was necessary to go over private prop-

erty; a change in this arrangement has been effected by the company, by purchasing eighteen-hundredths of an acre of land, and all necessary extensions to the driveway, leading to such track, will be constructed; the station itself will have a brick foundation and be of attractive design. All these facts conclusively appear from the testimony of witnesses on behalf of the respondent, and from exhibits, plans, maps and other documents which have been presented to the Commission and filed with the papers in this case.

The record is also replete with evidence showing the generosity and public-spiritedness of the proponents of the new site. In addition to the tender of an ample tract of land for the station and station lay-out, they are also willing to donate the land and pay all the cost of a good road and sidewalk from the brick pavement to the proposed new site, a distance of about eleven hundred feet. Certain members of the town board appeared at the last hearing and announced that the town would undoubtedly accept and maintain such road; although it must be said that it does not appear affirmatively and definitely that either such proponents or the town board would be ready to expend such an amount of money as witnesses for the respondent testified would be necessary in order to build a road equal to the state highway, and do all the required grading and filling and construct the sidewalk.

But even if it should be made absolutely certain that the best kind of public passageways could be constructed and maintained from the brick pavement to the Holmes site, still the Commission would be without legal authority to compel the railroad company to move its station location, provided the facts above recited establish the adequacy and convenience of the old site for both the public and the company. While negotiations for the change were going on, it was very proper to urge these considerations upon the respondent, in order to influence voluntary action on its part; in like manner it has been asserted that the location of the station on

the Holmes site would tend to develop the territory in its immediate vicinity, and would give great satisfaction to many of the residents of the hamlet of West Falls, whose business or homes are nearer the Holmes site than they are to the old location. These and many other arguments have been earnestly made by those who are anxious for the change, supplemented by suggestions from representatives of the Commission, who have been actuated by a desire to adjust the matter amicably, and who have been impressed by the reasons thus advanced; while the advocates of the plan to keep the station where it is have not been idle, and perhaps they are entitled to the praise,—or blame,—for bringing about such an improved condition at the old site, that the railroad company is firmly convinced that the added facilities which have been definitely provided for, will satisfy every legal requirement for adequacy and convenience, not only for the present but for many years to come, having in mind the growth and development of West Falls, and the resultant increase in freight and passenger traffic at such station. On account of such enlargement of the station grounds and improvement in station facilities, and also by reason of the failure of the residents of West Falls to embrace the opportunity given them by the railroad company to settle this controversy among themselves, the respondent now demands that it be left free to exercise its legal prerogative to utilize the property which it now owns, and construct a station thereon, with the facilities and conveniences hereinabove set forth, subject only to the direction of the Commission as to such details of the same as may be deemed requisite to guarantee the convenience of the traveling public and the necessities of the railroad company.

Thus the Commission is confronted with a sterner duty than was involved in the negotiations which have been carried on for many months; for a decision must now be made in this case, and such decision should be uninfluenced by the mere desires or sentimental reasons which have been

advanced by the parties; and even the personal predilections of the representatives of the Commission heretofore entertained and expressed should have no weight in reaching a result which must be based upon the evidence in this case, as it now exists, and be well within the authority of the Commission as defined by section 50 of the Public Service Commissions Law. This task has been rendered easy by reason of the proof made by the respondent at the last hearing in this case.

Before the proof was made, it appears that the old station site lacked many of the facilities and conveniences which every community is fairly entitled to; and, therefore, the criticism of the same, coupled with the assurance that they could be easily supplied at the new site, was an argument possessing considerable force; and if that condition remained unchanged, perhaps a different conclusion would be reached in this case. But now, almost every important feature of this station site has been changed, enlarged and improved to such an extent that such criticism can no longer be justly made; and it must be admitted that, as regards the size of the station grounds, the public passageways, the team track extension, and other details relating to the station building and the lay-out of the grounds, all of which are shown by the exhibits in this case, if the railroad company will make such changes and improvements,—and the company has agreed to do so,—then this community will have a station which will satisfy every requirement of the law, and, at the same time, will guarantee adequate facilities for the railroad company for many years to come, and reasonable convenience for the traveling public.

) This is the view expressed by the several experts who were called as witnesses at the last hearing, and who further stated that they believed that the facilities thus installed will meet all the demands of three times the present freight and passenger traffic at West Falls. We are in accord with this opinion, and must give the approval of the Commission to

the action of the respondent in determining upon the old site for station purposes.

This action will probably be a disappointment to many of the residents of West Falls who have felt that their personal preferences ought to be considered of more importance than has been accorded to them; others may think that their generous offers in connection with the proposed new site have been brushed aside as of no consequence, while they believed the same to be of the utmost potentiality.

We have already pointed out that the Commission has given due consideration to these matters, but that they can not outweigh the specific requirements of the statute that the railroad company shall furnish adequate and convenient station facilities for itself and the traveling public.

It is quite apparent, therefore, that the company has fully met these legal requirements by providing for the changes, additions and improvements made and contemplated at the present station site, and above enumerated; this will assure reasonable security and convenience to the public, and will also afford adequate service and facilities for the transportation of passengers and property. Thus the full measure of public duty has been performed by the respondent, with reference to its station and station facilities, and it necessarily follows that the decision of the Commission should approve the determination of the railroad company to utilize, extend and improve its present station site according to the plans thereof filed with the Commission; and the application herein that the station be moved to the new site must be denied.

An order will be entered in accordance with these views, and the respondent be directed to proceed within a reasonable time with the construction of its station building, grounds and lay-out, and complete the same with all convenient speed.

All concur, except Commissioner Carr not present.

In the Matter of Proposed New Passenger Fares by Various
Common Carriers Subject to the Jurisdiction of this
Commission. [Case No. 5345.]

On application to reopen this case, decided June 8, 1916, Opinion No. 267, the railroad company sought an opportunity to offer evidence as to the value of its property used in intrastate passenger service.

Held, 1. That the burden under the statute being upon the carrier to justify the increase in rates, the case having proceeded upon the theory that the increase was justified because the intrastate revenue was less than the intrastate cost, the Commission having found that as to certain lines this was not the fact, and there being no suggestion that evidence of value was omitted because of accident, surprise, or ruling of the Commission, the case could not be reopened for the purpose of admitting such evidence.

2. That the refusal to reopen the present inquiry does not preclude the railroad company from filing such new tariffs as it may feel able to support by any proper evidence should another contest arise.

3. In this inquiry, which was under section 29 of the Public Service Commissions Law as amended by chapter 240 of the laws of 1914, and relates only to the reasonableness of tariffs showing increased fares filed by the company and suspended by the Commission, the Commission could not originally or on rehearing consider whether certain fares not increased by the suspended tariffs should properly be increased, assuming that the Commission has, in a proper proceeding, authority to authorize such increase.

Decided July 26, 1916.

By the Commission:

This is a proceeding under section 29 of the Public Service Commissions Law as amended by chapter 240 of the laws of 1914, whereby the operation of certain passenger tariffs was suspended and an investigation entered upon as to their reasonableness. An order was made June 8, 1916, directing that the proposed tariffs as filed by or on behalf of The New York Central Railroad Company should be canceled on or before July 1st. The facts fully appear in the opinion of Carr, Commissioner, upon which the order was

based. [Opinion No. 267.] The New York Central Railroad Company asked further time within which to determine whether it should accept such order or apply for a rehearing; and later, having filed the present application, the operating date of said order has been postponed and the suspension order continued until the 1st day of August, 1916.

The application is to reopen the proceedings in order that further evidence may be introduced. Grounds for the application are stated in three paragraphs:

First, that the petitioner having been of the opinion that the evidence which it could and did produce before the Commission would show that its revenue from intrastate passenger business in the State of New York was not sufficient to pay the cost of that service and that no return upon the value of its property used therein was received therefrom, the petitioner did not introduce evidence either as to its investment in said property or as to its value, and that it desires on a reopening of the case to introduce such evidence.

Second, that in filing this revision of passenger rates it did not change the two cent rate in effect locally between Albany and Buffalo, and that, in view of the decision of the Court of Appeals in *Ulster & Delaware Railroad Company v. Public Service Commission*, 218 N. Y. 29, the petitioner desires to make such revision of its local tariffs between Albany and Buffalo as will bring them into harmony with its passenger rates in other parts of the State.

Third, that there should be harmony between the intrastate and interstate passenger rates, and that the determination of this case should be upon the fullest evidence and most thorough consideration of all of the elements of the problem. This third proposition is not specific and may be taken merely as a resumé or generalization of the two preceding.

At the beginning of the investigation, counsel for the petitioner made the following statement:

We have not proposed, in the preparation of our case, and we do not propose in the presentation of it, to go into the question of valuation or of interest charges of any character. We simply intend to confine ourselves to the intrastate passenger revenues and the intrastate passenger expenses and the value of the service. To that end we will present our testimony, and we hope to be finished very shortly. Our reason for not going into the valuation question is, first, that it would be embarrassing at this time when the Interstate Commerce Commission is conducting a valuation of all the railroads of the country; and second, that it is unnecessary, as our intrastate passenger revenue is less than our intrastate costs, and of course it follows that if we are entitled to a reasonable return upon our investment and we do not obtain from the service enough of a return to pay the expenses, then it is unnecessary to go into the return on the investment.

The burden under the statute being upon the carrier to justify the increase in rates, the case proceeded upon the theory so presented. A great volume of evidence was taken upon that theory, with the result that the Commission found that the petitioner had failed to establish it in fact. It is not now suggested that evidence as to investment or value was omitted because of any accident, surprise, or ruling of the Commission, and were we to follow the rules of legal procedure it would clearly be improper to reopen the case for this particular reason. It would be unfortunate, however, to dispose of so important a matter upon any ground savoring of a technicality provided such disposition would disregard the substantial rights of the parties. On page 31 of the opinion of Commissioner Carr appears the following:

From all the evidence which has been presented to us in this case, we are convinced that the New York Central has failed to justify any increase in its fares on its Hudson division between Albany and New York. As we have hereinbefore stated, the main line of the New York Central, even with the maximum fares ranging from 2 cents to 2.17 cents per mile, is earning a fair return, and the earnings on several of its other divisions are probably insufficient to pay a fair return on the passenger service on those divisions. We call attention to the fact here, that on some of those divisions, namely the Putnam and the Harlem, the existing tariffs are full of discriminations, and the tariffs which are now under suspension would probably remove many of these discriminations. In any event, it would seem advisable for the company to give prompt consideration to the criticism here made of the existing

tariffs on these particular divisions, to the end that discriminations may be removed. It would probably necessitate some study on the part of the railroad officials to determine whether or not it will seek to advance the rates on any of the divisions which are now operated at a loss, and for that reason we think the better way to dispose of the matter is to require the cancellation of all the passenger tariffs filed by the New York Central which have been under suspension pending this investigation and an order will be entered to that effect.

It is therefore evident that the order directing the cancellation of the tariffs was not an adjudication that the petitioner might not properly increase its rates upon any part of its lines or in any particular amounts. The Commission having determined that the system of tariffs proposed was unreasonable in so far as it affected the Hudson division, it thereupon considered that existing tariffs disclosed discriminations elsewhere, that the proposed tariffs were filed in pursuance of a general plan, and that the elimination of the proposed tariffs on the Hudson division would disarrange that plan. It was therefore left for the railroad company to make a new study of the problem and, if it saw fit, present a new system of tariffs. A refusal to reopen the present inquiry does not therefore preclude the railroad company from filing such new tariffs as it may feel able to support by any proper evidence if another contest should arise.

The second ground of the petition is the argument that the petitioner is no longer bound by chapter 76 of the laws of 1853, limiting passenger rates for way passengers between Albany and Buffalo to two cents a mile, and petitioner relies on *People ex rel. Ulster and Delaware Railroad Company v. Public Service Commission*, 218 N. Y. 29. In the *Ulster and Delaware* case, the court had under consideration the so called Mileage Book Law, and it held that notwithstanding the provisions of that law [Railroad Law, section 60] the Commission has power where it appears that the statutory rate of two cents a mile is insufficient, to permit an increase in the rate. Justice Cochrane, whose opinion, 171 Appellate Division 607, was adopted by the Court of Appeals, referring to the limitation of two cents a mile under section

60, says: "Those limitations remained on the railroad, but not on the power of the Commission. . . . My opinion is that section 60 of the Railroad Law establishes the maximum rate for mileage books in the absence of an order by the Commission. It represents the law on the subject so long as the Commission takes no action. But sections 49 and 33 of the Public Service Commissions Law authorized the Commission to make an investigation, and where it appears that the statutory rate of two cents per mile is insufficient, the Commission may by order increase the rate above that amount."

Assuming that the same reasoning applies to the act of 1853 above referred to, limiting fares for way passengers between Albany and Buffalo to two cents, no question of an increase of that rate is presented or could be presented in the present case. This is an investigation under the act of 1914 as to the reasonableness of certain tariffs filed by the railroad. These tariffs do not affect way rates between Albany and Buffalo. The Commission in this proceeding can consider only the tariffs under suspension. Way rates between Albany and Buffalo remain at the statutory figure at least until the Commission in an appropriate proceeding authorizes a higher rate. This is not such a proceeding. The petition to reopen the case must, therefore, be denied.

All concur except Emmet, Commissioner, who dissents; and Carr, Commissioner, who is absent.

In the Matter of the Joint Petition of NORTH SHORE ELECTRIC LIGHT AND POWER COMPANY and PORT JEFFERSON ELECTRIC LIGHT COMPANY under section 70 of the Public Service Commissions Law for consent to the transfer of the franchises, works, and system of the last named company to the first named company; which petition includes that of the North Shore Company under section 69 of the Public Service Commissions Law for authority to issue \$20,000 common capital stock and \$53,000 5 per cent first mortgage 25-year gold bonds, and under section 70 for consent to acquire \$28,000 of the mortgage bonds of the Port Jefferson Company. [Case No. 5562.]

Petition of Edward A. Alexander, attorney for the Executors of William Henry Blatch, deceased, for rehearing.

1. The Commission should not, in authorizing the sale of the plants and franchises of a corporation subject to its jurisdiction, impound the purchase money or require a bond in order to secure demands against the vendor company not liens upon its property, unliquidated and not adjudicated to be valid, although an action may at the time be pending having for its object the enforcement of such demands.

2. The Commission can not, merely because a defendant in a pending judicial proceeding is a public service corporation, grant a remedy provisional or ancillary to that proceeding.

Decided July 31, 1916.

Appearances:

Frank Weinstein, 165 Broadway, New York city, as counsel for petitioner.

Howard C. Hopson, 61 Broadway, New York city, for the North Shore Electric Light and Power Company and Port Jefferson Electric Light Company.

E. E. Wheeler, Vice-president of the Port Jefferson Electric Light Company.

By the Commission:

An order made by the Commission in this case June 6, 1914, authorized the Port Jefferson Electric Light Company to sell all of its property, rights, and franchises, except cash, bills and accounts receivable, and a certain parcel of land in the village of Port Jefferson, subject to certain outstanding bonded indebtedness, to the North Shore Electric Light and Power Company, "provided that there shall be no other outstanding indebtedness on such property at the date of the transfer," and subject to other conditions. The purchase price was the sum of \$37,000.

There has been filed on behalf of the executors of the last will and testament of William Henry Blatch, deceased, an application for a rehearing upon the ground that these executors have pending in the Supreme Court of the State of New York an action against the Port Jefferson Electric Light Company to recover damages stated at \$100,000 for the death of their testator, caused, as alleged, by the negligence and wrongful act of the Port Jefferson company, and that no provision is made in the Commission's order for the protection of the applicants or other unsecured creditors. The specific request is that some suitable provision should be inserted in the order protecting the rights of creditors having unliquidated claims against the Port Jefferson Electric Light Company, and especially the claim of the executors of William Henry Blatch, deceased. The Commission, doubting its authority in the premises, gave a hearing to the applicants, and upon the hearing the demand of the applicants was again stated "that a provision be inserted in the order of June 6th granting permission upon the condition that the Port Jefferson company retain the \$37,000 intact until our claim for damages is passed on by the courts; or, that the Port Jefferson company give a suitable bond for such amount which this Commission may deem reasonable, conditioned to pay any judgment which the executors of William Henry Blatch, deceased, may obtain against the Port Jefferson company".

The question is thus presented whether the Commission may, or, in the exercise of its discretion, should, on authorizing the sale of the plant and franchises of a corporation subject to its jurisdiction, impound the purchase money or require a bond in order to secure demands, not liens upon the property, unliquidated and not adjudicated to be valid, although an action is at the time pending having for its object the enforcement of such demands.

Appeal is made to the broad general provisions of the Public Service Commissions Law giving the Commission general supervision over electrical corporations. This supervision is granted for the purpose of compelling the performance by the corporation of its public duties specified by law. The Public Service Commissions Law did not confer upon the Commission the power of a court of law or equity to adjudicate private rights between the corporation and others, and it must of course be conceded that this Commission can not take jurisdiction of the claim of the executors against the Port Jefferson Electric Light Company. That is a matter for the courts alone. The Code of Civil Procedure contains certain enactments for provisional remedies in aid of pending judicial proceedings. By section 604, an injunction may be had "where it appears by affidavit that the defendant during the pendency of the action threatens or is about to remove or to dispose of his property with intent to defraud the plaintiff". By sections 635 and 636, in an action for injury to person or property in consequence of negligence, fraud, or other wrongful act, an attachment may be had upon affidavit that the defendant if a natural person or a domestic corporation "has assigned, disposed of or secreted or is about to assign, dispose of or secrete property with like intent" [to defraud his creditors]. It is elementary law in this State that these provisions are exclusive. Indeed, it was admitted on the hearing that an injunction could not be had unless the applicants could show fraud on the part of the corporation, "which we admit at the present time we can not do". "To be frank,

we do not believe the equity court has jurisdiction." [S. M. 5, 10.] If the courts in aid and protection of their own jurisdiction are confined to specific statutory authority, the Commission certainly can not, because of the mere accident that the defendant in the action is a public service corporation, confer a provisional or ancillary remedy denied to the court having jurisdiction of the case.

It is said that the sale is illegal because it operates to divest the corporation of all its property without paying its obligations. If this is true, it must be because the sale operates as a fraud upon creditors. In that event the applicants would have a remedy in the appropriate forum.

On the hearing, a brief was invited and counsel asked to direct this particularly to the status as a creditor of one holding an unliquidated claim. This is disposed of in the brief by the bland statement that there are legal authorities to support the applicants' contention, and if the Commission should express any doubt upon the subject, counsel asks permission to submit a few controlling authorities. The Commission expressed doubt on the hearing and asked that the brief be directed to this point. There is certainly no controlling authority requiring the Commission to protect, in the manner requested, anyone who merely shows that he has a tort action pending for unliquidated damages, undetermined and untried. Such a practice would permit any unscrupulous person, merely by serving a summons, to delay and perhaps defeat enterprises of the most desirable and most urgent character. The motion for rehearing must be denied.

In the Matter of the Complaint of the HIGH HILL BEACH IMPROVEMENT ASSOCIATION, Nassau county, *against* NEW YORK TELEPHONE COMPANY, asking for telephone service during the Summer. [Case No. 5548.]

Under the circumstances described in the opinion, it was held that telephone service should be installed at High Hill Beach, Nassau county, leaving the question of how a resulting loss, if any, upon the investment should be met for subsequent adjustment in case it should arise.

Decided August 8, 1916.

Appearances:

Owen W. Bowen, 61-65 Park Row, New York city, for complainant.

George R. Grant, 15 Dey street, New York city, for respondent.

EMMET, Commissioner:

This case presents an interesting and unusual situation, which so far as we know is without any parallel in New York State. High Hill Beach, a summer colony on Long Island within easy distance of New York city, comprising upward of one hundred and twenty-five bungalows owned by a substantial class of people, most of whom are telephone subscribers at their permanent residences and business places in New York, is and always has been entirely without commercial telegraph or telephone facilities of any sort. The New York Telephone Company has never felt inclined to extend its wires to the Beach on account of the comparatively high cost of construction and maintenance that would be involved in the operation. The Beach is distant about four miles, as the crow flies, from the main portion of Long Island, but about twice that distance by the winding channel that must be followed by boats approaching the Beach. It is

served by three ferries from the mainland. There are in this community some six hundred summer residents, and a transient population on Sundays and holidays of from twelve hundred to fifteen hundred people. It has a post-office, a general store, a hotel, and it is only thirty miles, air line distance, from Manhattan Island.

No obstacle except an unlikelihood of resulting profits stands in the way of the Telephone company's establishing its service at High Hill Beach. Bringing the wires over from the main portion of the Island according to plans which have already been decided upon in case the work ever has to be done will, in the opinion of the company's engineers, involve a construction expense of about \$7500, with carrying charges thereafter amounting possibly to as much as \$1500 per annum. These estimates are probably fairly liberal. The construction estimate was based, as we understand it, upon the possibility that the work might have to be undertaken immediately and hurried through. If that should prove not to be the case — if in completing the work advantage could be taken of seasonable conditions — it has been suggested that certain substantial economies in the estimated construction cost might easily be effected.

In refusing, heretofore, to grant the request of these petitioners for telephone service, the Telephone company has been acting on the theory that if its wires were brought to the Beach, one public telephone station would probably be found to answer all the requirements of the neighborhood, and that therefore no general installation of private telephones in the cottages would take place. They have been influenced also, of course, by the fact that High Hill Beach is only a summer colony and not a place of permanent residence. They have concluded, from these circumstances, that their revenue from outgoing messages over a High Hill Beach extension would be small, probably not exceeding \$200 per annum. This would be an insignificant return upon the estimated cost of the extension and the high carrying charges.

It has seemed to the Commission, however, after considering the case quite carefully from every point of view, that a community as large as the one at High Hill Beach, even though it be but a summer colony — situated so near New York, and inhabited for several months of each year by people intimately connected by social and business ties with the city, and going and coming constantly between the two places — is, under existing conditions in New York state, entitled to telephone facilities even if these should not prove to be immediately self-supporting. It seems to us that the granting of relief in an exceptional situation of this kind is one of the public duties which a great and prosperous utility corporation like the New York Telephone Company has to hold itself ready occasionally to perform. With the general policy followed by the New York Telephone Company in regard to the extension of its lines into remote localities when it is often in the highest degree conjectural whether adequate profits will result, we have no fault whatsoever to find. The company has, in the main, done its duty to the public admirably in this matter of bringing telephone conveniences within the reach of practically everybody. Where some isolated householder in a remote country district, whose use of the telephone must under any circumstances be slight, demands telephone facilities involving a large original construction outlay, we have never thought it unreasonable that some guarantee or agreement should be asked for: either establishing a minimum amount which shall be paid monthly or annually for the service, whether used or not; or apportioning the cost of construction, in some equitable manner, between the company and the subscriber. This policy is really as much in the interest of the telephone users generally as it is in the interest of the telephone company, and we are far from intending, by our decision in this case, to suggest that the Commission's attitude toward this general question of unprofitable telephone extensions has in anywise changed. The case now before us seems, as we have said, to be *sui*

generis — one which can be disposed of without the risk of establishing any dangerous precedent. As a matter of fact, we do not believe — the company's estimates to the contrary notwithstanding — that a High Hill Beach-extension would long remain unprofitable. There is every reason to suppose that the installation of private telephones will proceed apace at High Hill Beach, as it has everywhere else, once it has become a possibility. Furthermore, the establishment of a telephone system at the Beach must inevitably cause a considerable amount of business that will be profitable to the Telephone company, to originate elsewhere — business which may not appear on the company's books to the credit of the High Hill Beach system at all, but which none the less would never have originated if such a plant had not been in existence. If a slight resulting loss on the investment *should* ensue, the question of how this loss ought to be met — whether by the public generally or by the company out of its abundant profits elsewhere — will not be a very difficult one to handle, and may be reserved for subsequent adjustment in case it should arise. The order of the Commission is, therefore, that the New York Telephone Company shall proceed with the construction of a telephone line to High Hill Beach, and complete the same on or before June 1, 1917.

In the Matter of the Joint Complaint of THE ATLAS PORTLAND CEMENT COMPANY, ALPHA PORTLAND CEMENT COMPANY, HELDERBERG CEMENT COMPANY, ALSEN'S AMERICAN PORTLAND CEMENT WORKS, KNICKERBOCKER PORTLAND CEMENT COMPANY, GLENS FALLS PORTLAND CEMENT COMPANY, ACME CEMENT CORPORATION *against* BOSTON AND MAINE RAILROAD, asking that its tariff P. S. C., 2 N. Y. No. 714, be suspended, and that a regulation therein limiting quantity of cement to be included in a mixed carload be declared improper. [Case No. 5600.]

Under the circumstances mentioned, it was held that the question in which the complainants are really interested—namely, the question of the fairness of the rates for straight carload shipments of cement now in force on the Boston and Maine Railroad—can not properly be adjudicated in a proceeding brought to compel the withdrawal of a tariff on mixed carloads of cement and other specified articles; but that this question should be raised by a direct attack upon the straight carload rates, which has not been made in the present case with sufficient definiteness to warrant the making of an order herein affecting these rates.

Decided September 7, 1916.

Appearances:

Frank Lyon, 401 Colorado Building, Washington, D. C., for the complainants.

W. A. Cole, North Station, Boston, Mass., for the respondent.

EMMET, Commissioner:

A tariff known as P. S. C., 2 N. Y., No. 614, has been in force for some time on the Boston and Maine Railroad in New York state and elsewhere, covering mixed shipments of sewer pipe, drain tile, clay conduits, fire and paving brick, and cement. The tariff in question is not, so far as we can see, preferential or discriminatory in its character, notwithstanding the fact that it is said to have been prepared chiefly to meet the rather special requirements of a concern

in Portland, Maine, which manufactures all the various commodities, except cement, that are mentioned in the tariff, and which finds it desirable to include with its shipments of the articles it manufactures a small amount of cement also, so that its customers may, as the result of a single transaction, be placed in the position of being able to make actual use, in structural work, of the tiles, conduits, or other material purchased from the Maine company. Although no limitation upon the amount of cement which might be shipped in a mixed carload of this character was provided in tariff No. 614, it was not supposed by the railroad company that cement shipments under this tariff would ever be made in larger quantities than was necessary to enable purchasers of the other commodities to put their purchases to immediate use in the manner stated. In other words, the inclusion of cement in tariff No. 614 was merely incidental: the tariff was designed primarily to cover the commodities named other than cement.

The petitioners in the present case are all large manufacturers of cement who deal in none of the other commodities mentioned in tariff No. 614. Ordinarily they would have no interest at all in a question of mixed carload rates. Observing, however, that the Boston and Maine straight carload rate on cement was higher by about 25 per cent than the mixed carload rate established by tariff No. 614, and that the tariff in question placed no restriction upon the amount of cement which might be included in a mixed carload, these petitioners commenced some months ago to vary the method they had formerly followed in the shipment of cement to places in New England, and possibly to points in easternmost New York also—although as a matter of fact there seem to have been no actual intrastate shipments made by petitioners under tariff No. 614. But, for New England shipments, petitioners abandoned the use of the railroads at the several points of origin, in Hudson, N. Y., and other places, and inaugurated the practice of loading their product on barges belonging to themselves, at

the manufactories, and in this way transporting it to Troy, which is a New York terminus of the Boston and Maine Railroad. At Troy, the cement is now being forwarded over the Boston and Maine Railroad under tariff No. 614 in what are technically mixed shipments, although to all intents and purposes the consignments in question are straight carload shipments of cement only. They are brought under the "mixed carload" designation, and therefore under tariff No. 614, by the simple expedient of including with the cement a nominal amount of one of the other commodities mentioned in tariff No. 614 — purchased by the shippers and included in the shipment for no other purpose than to make what is virtually a straight carload of cement assume the legal character of a mixed carload to which the rates provided by tariff No. 614 would be applicable.

When the Boston and Maine Railroad ascertained that this was being done, it filed with the Commission a new tariff (P. S. C., 2 N. Y., No. 714) designed to take the place of tariff No. 614, and differing from the superseded tariff only in that it limits the amount of cement which may be shipped in mixed loadings to 8000 pounds. Of course this limitation interferes with the petitioners' ingenious plan of shipping cement in large quantities at the reduced rate established by tariff No. 614, and the present proceeding has been brought to prevent, if possible, the substitution of the new tariff for the old.

We have no desire, of course, to deal with a situation like this in a technical spirit, or otherwise than upon its merits, and if the question of the cement rates on the Boston and Maine Railroad in which the present petitioners are legitimately interested could be settled fairly and comprehensively by an order in the present case, we should be glad to make such an order rather than require the petitioners to bring a new proceeding. But obviously the real question in which the petitioners are interested can not be fairly settled in the present case. The only cement rate with which under ordinary circumstances the petitioners — who manufacture

and sell cement in enormous quantities — are in the least concerned, is the rate on straight carload shipments of the commodity, and *that* rate is not involved, except in the most indirect way, in the present proceeding. Here we are called upon to pass upon the suitability and fairness of mixed carload rates which were never intended to apply to shipments like those made by these petitioners, and which the petitioners themselves very frankly say they would never avail themselves of if the Boston and Maine Railroad's straight carload rates were made reasonably satisfactory to them. It seems undesirable and unnecessary that an important question like this should be settled in such an indirect, not to say devious, manner as here proposed. We think that the petitioners should raise the question of the fairness of the existing rates on straight carload shipments by a direct attack on such rates, and not by an attack upon a tariff in which, but for an unintended loophole in the wording, they would not have been interested at all, and in which their interest will entirely cease as soon as the question of the fairness of the Boston and Maine Railroad's straight carload rates on cement has been satisfactorily adjusted. A proceeding to test these last mentioned rates has already been brought, as we understand it, before the Interstate Commerce Commission, in relation to interstate shipments of cement over the Boston and Maine Railroad; and a similar proceeding as to intrastate rates could with very slight loss of time be instituted here if it were felt that the pending interstate proceeding does not afford petitioners the opportunity they desire to get the entire question settled upon its merits. We feel that an orderly adjudication of the question can not be reached in the present proceeding, and that it is not our duty, under the circumstances, to prevent the tariff which has been filed with us, limiting the amount of cement which may be included in mixed shipments under the Boston and Maine Railroad's former tariff No. 614 to 8000 pounds, from taking effect.

All concur.

In the Matter of the Petition of the BOARD OF PUBLIC WORKS OF ROME, under section 90 of the Railroad Law, for a determination as to how an extension of Fifth street in said city shall cross the industrial branch of the New York Central Railroad in said city. [Case No. 5560.]

Under section 90 of the Railroad Law the procedure, when it is proposed to open a new street or portion of a street across a steam surface railroad, is for the municipal authorities, after notice and hearing, to determine the necessity of opening such street or portion of street, and having determined that such opening is necessary, to apply to the Commission to determine whether such street shall pass over or under such railroad or at grade. The Commission has no authority to determine the necessity of opening such street, nor has it authority to determine whether such street shall pass over or under such railroad or at grade until the municipal authorities have determined the necessity of the street.

Decided September 19, 1916.

Appearances:

Albert J. O'Connor, City Attorney, for the City of Rome.

H. Clayton Midlam, Mayor of City of Rome; *T. J. Mowry* and *D. A. Lawton*, Members of the Board of Public Works of Rome; *H. Barnard, Jr.*, President of the Common Council.

Arthur S. Evans, Rome, N. Y., as counsel for Rome Wire Company, Rome Manufacturing Company, Rome Brass and Copper Company, and Rome Hollow Wire and Tube Company.

William Eames, representing James A. Sparge, President of Sparge Wire Company.

William A. Searles, Secretary, Chamber of Commerce of Rome.

Kernan and Kernan, Utica, N. Y. (by Warnick J. Kernan), for The New York Central Railroad Company.

IRVINE, *Commissioner*:

This is an application on behalf of the City of Rome for "permission to extend Fifth street from East Dominick street across the New York Central tracks to Railroad street, in the city of Rome, at grade". Under the charter of the City of Rome, the Board of Public Works is constituted the municipal authority having control over streets. The main line of the New York Central and Hudson River railroad formerly passed through the section of Rome herein involved. These tracks are now industrial tracks of the New York Central railroad. Parallel thereto on the north is East Dominick street; and on the south, Railroad street. Fifth street extends south to East Dominick street, where it now ends. What is desired is to extend Fifth street at grade across these industrial tracks to Railroad street. The project, therefore, is to construct a new portion of a street across a steam surface railroad, and the application must be sustained, if at all, under section 90 of the Railroad Law. This, omitting portions not relevant to the present inquiry, provides that "when a new street, avenue, highway or road or new portion of a street, avenue, highway or road . . . shall hereafter be constructed across a steam surface railroad . . . such street, avenue, highway or road or portion of such street, avenue, highway or road shall pass over or under such railroad or at grade as the Public Service Commission shall direct. Notice of intention to lay out such street, avenue, highway or road or new portion of a street, avenue, highway or road across a steam surface railroad shall be given to such railroad company by the municipal corporation at least fifteen days prior to the making of the order laying out such street, avenue, highway or road. . . . Such railroad company shall have the right to be heard before the authorities of such municipal corporation upon the question of the necessity of such street, avenue, highway or road . . . If the municipal corporation determines such street, avenue, highway or road to be necessary . . . such municipal

corporation . . . shall then apply to the Public Service Commission before any further proceedings are taken to determine whether such street, avenue, highway or road shall pass over or under such railroad or at grade." Further provisions also plainly indicate that the province of this Commission, and its sole province, is, after a determination by the municipal corporation that the street is necessary, to determine in what manner it shall cross the railroad, whether above, below, or at grade. In this case the record shows that notice of a hearing before the Board of Public Works was given to the Railroad company; that a hearing was held; and that thereafter the only action taken was a resolution of the Board, as follows: "That the City Attorney be and he hereby is authorized and directed to take such steps as may be necessary for the purpose of presenting the matter of the extension of Fifth street across the New York Central Railroad tracks to Railroad street, to the Public Service Commission, and secure, if possible, such crossing." The Railroad company contends that this does not constitute a determination of the necessity of the proposed extension of the street; that there has been no such determination; and that there is no order laying out such extension. The Commission is forced to the conclusion that this contention is well founded. The statute evidently leaves it to the municipal authorities to determine whether the new street or extension of street is necessary. It is not within the authority of the Commission to lay out city streets or to determine the necessity therefor. The city having determined the necessity of extending the street, the extent of the Commission's authority is plainly indicated by the statute. It is restricted to determine the manner in which the street shall cross the railroad, whether overhead or underneath the tracks, or at grade.

The point raised is not a barren technicality. The Railroad company resists a grade crossing at this point, and it is probable that a crossing except at grade is not practicable.

It contends that the proposed extension is not necessary, and it has a right to a judicial review of that question. The determination of the question must in the first instance be by the municipal authorities. The resolution neither expresses nor implies a determination as to the necessity of extending the street. It proceeds upon the assumption that this Commission rather than the Board of Public Works has authority in the premises, and merely instructs the City Attorney to take steps before the Commission to secure, if possible, such crossing. While it is plainly inferable that the members of the Board of Public Works thought the street extension desirable, it is as strongly inferable that they did not realize that they were the body who must authoritatively pass upon and determine the necessity of the extension. The Board has not created or laid out any street, and until it shall have done so the Commission can not determine the manner of crossing the railroad.

Should the Commission proceed to determine the manner of crossing, its order would be voidable, if not absolutely void, for lack of the statutory foundation. The petition must, therefore, be dismissed.

All concur.

In the Matter of the Complaint of RESIDENTS OF THE HAM-
LET OF WEST FALLS, Town of Aurora, Erie county,
against BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY
COMPANY, as to location of new station building proposed
to be built. [Case No. 4942.]

Decided September 19, 1916.

Appearances:

Messrs. Kellogg & Baker, by Philip A. Sullivan, for citi-
zens of the village of West Falls and for Mr. Hoyt Henshaw
in favor of the Holmes site.

Messrs. Clinton, Clinton & Stryker, by George Clinton,
Jr., for citizens in favor of the old site.

Messrs. Havens and Havens, by W. F. Strang, for the
Buffalo, Rochester and Pittsburgh Railway Company.

Mr. Hoyt Henshaw in person.

By the Commission:

On the 26th day of July, 1916, this Commission entered an order dismissing the complaint of certain residents of the hamlet of West Falls, in the town of Aurora, relative to the proposed location of the new passenger station and the adequacy of the site of said station at West Falls, on the line of the Buffalo, Rochester and Pittsburgh Railway Company, and also denying the request of the complainants that said station should be erected at another place in the town known as the Holmes site. The complainants feeling aggrieved at this determination by the Commission made an application for a rehearing, claiming that certain misrepresentations had been made to the Commission by the representatives of the Railway company which might have influenced the decision so made. The hearing upon this application for a rehearing was brought on before the Commission in the city of Albany, N. Y., on September 13, 1916. The matter was gone into quite exhaustively on the merits at that time, and

counsel for the complainants as well as one of the complainants in person, Mr. Henshaw, stated that no further facts than those there presented could be furnished the Commission if a rehearing on this application should be granted, and that so far as they were concerned, they would be satisfied if the Commission should consider this as not only an application for a rehearing, but in fact a rehearing. We think perhaps it may be advisable to handle the case in that way, and thus dispose of it upon its merits at this time. No new facts regarding the matter were presented to the Commission, but it did appear that in some few respects there had been certain errors made in the data and statements presented to the Commission by the Railway company. These, however, are not so material as to justify a reopening of the case, nor would they in the opinion of the Commission afford ground for changing the determination which has previously been made. It may not be out of place here to re-state a few of the facts which appear in the record in this case.

About two years ago the passenger station of the Buffalo, Rochester and Pittsburgh Railway Company at West Falls was destroyed by fire. Since that time, temporary passenger station facilities have been provided there at the same location. An improved brick paved state highway passes through the hamlet of West Falls, running in a general northerly and southerly direction. This improved highway crosses the tracks of the Railway company at or near the site of the former passenger station. The freight yard is also located near that site. Passengers traveling on foot or in vehicles can reach the present station conveniently by means of the improved highway. The center of the hamlet of West Falls is at a point on the state highway about thirty-six hundred feet southerly from the site of the old station. The Railway company proposes to build a new passenger station upon the old site, and claims that if its plans are carried out adequate and proper facilities will be provided for passenger and freight traffic. The complainants seek to have the new passenger station located at a point on the line of the railway

about thirteen hundred feet westerly from the center of the hamlet above referred to. The new site is now reached by an existing country highway of varying grades and unimproved in any respect. Some of the interested parties have agreed to donate a parcel of land for station purposes at the point in question. It would probably entail considerable more expense upon the Railway company to put up a station at the site proposed by the complainants, and a substantial amount of money would also be required to improve the highway so as to make a suitable approach to this location from the center of the village. The complainants state that such a road will be provided, together with a cement sidewalk. However, these improved approaches do not now exist, and there is no assurance that if such a road were provided it would be properly maintained by the town. The Railway company, if it established its station at this point, would then be in the position of having its passenger station at least a-half a mile away from its freight station if its freight yard were kept at its present location, with the additional expense and inconvenience which would be entailed thereby. It is very doubtful if the Commission would have the power, on the state of facts presented in this case, to require such a separation of passenger and freight facilities in the hamlet of West Falls; it certainly could not be urged from the standpoint of economy in operation. Some claim has been made that the freight facilities are now inadequate, but the representatives of the corporation claim that when its plans are worked out, these facilities will be adequate for all purposes. Primarily, it is the opinion of the Commission that the location of a passenger station should be determined by the Railway company, as it is presumed to know best where such a station should be located properly to serve the public. While there may be certain inconveniences caused to some of the residents of West Falls by the rebuilding of the passenger station on the old site, yet from all the facts which appear in the record in this case, it is apparent that the old site will afford better accommodations at present, in

any event, than the site which has been proposed. It is incumbent upon the Railway company to provide the public with suitable and adequate passenger and freight facilities at West Falls. If it should develop that the plans of the Railway company if followed out as proposed do not furnish such facilities, the Commission has the power to require the company to provide them; whether or not the views of the representatives of the Railway company are correct can only be determined by actual experience. It is, therefore, incumbent upon the Railway company, before it proceeds with its plans, to be fully satisfied that such facilities will be afforded in order that all cause for complaint as to either passenger or freight facilities may be obviated.

The Commission has not attempted to pass upon the plans of the Railway company for the new passenger station and additional facilities at West Falls, and the fact that it has decided this matter adversely to the complainants is not to be taken in and of itself as an approval of such plans. In our opinion, the Commission could not possibly justify an order requiring the company to build a new passenger station at the site proposed by the complainants; and having in mind its power to compel the corporation to provide adequate facilities, it is our belief that the order heretofore made in this matter should stand, and the application for a rehearing be denied. An order to that effect should be entered accordingly.

All concur except Commissioner Hodson, who did not participate in this decision.

334 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

In the Matter of the Complaint of JOHN P. DRANEY, FRANK E. CALDWELL, and JOHN F. TYNAN of Poughkeepsie *against* CENTRAL HUDSON GAS AND ELECTRIC COMPANY, asking that the company extend its mains in Innis avenue and furnish premises of complainants with gas. [Case No. 5571.]

1. Section 62 of the Transportation Corporations Law makes it the absolute duty of a gas corporation, subject to the conditions of that section, to supply gas to the owner or occupant of any building or premises within one hundred feet of its mains. If the distance be more than one hundred feet, the Commission may require service to be rendered if it be reasonable so to do.

2. On an application for an order requiring service beyond one hundred feet, the Commission must determine first whether it is reasonable to require service to be rendered; and next, if it determines that it is reasonable to require such service, to fix the terms upon which it should be rendered.

3. Under the particular circumstances of this case set forth in the opinion, it was ordered that service should be rendered to the complainants either by extension of mains or by laying of service pipe from the corporation's present mains, as the corporation might determine, the corporation to pay the expense, but with the right to require complainants to deposit with the corporation the estimated cost of pipe and of laying the same from the street curb to the meters to be installed on complainant's premises.

Decided September 26, 1916.

Appearances:

John F. Tynan, 234 Main street, Poughkeepsie, N. Y., for complainants.

Leon H. Scherck, commercial manager of the Central Hudson Gas and Electric Company, 50 Market street, Poughkeepsie, for respondent.

IRVINE, Commissioner:

John P. Draney, Frank E. Caldwell, and John F. Tynan ask that the Central Hudson Gas and Electric Company be

required to supply their premises with gas. The respondent is willing to supply them with gas, but insists that, as a condition, the complainants make certain payments as complainants may elect, either for extension of main or for purchase and laying of service pipe. This charge the complainants are unwilling to pay. The premises of complainants front on Innis avenue, in the city of Poughkeepsie, north of King street. Mr. Draney's lot abuts on King street and is about fifty feet wide on Innis avenue. The south side of his house is twelve and one-half feet north of the line of King street. Mr. Caldwell's lot is fifty feet front on Innis avenue, immediately north of Mr. Draney's lot. The center of his house is approximately fifty feet from the center of Mr. Draney's house. Mr. Tynan's premises adjoin the premises of Mr. Caldwell to the north. The center of his house is approximately eighty feet north of the center of Mr. Caldwell's house. The respondent has a four-inch main extending northward on Innis avenue to a point sixty-eight feet south of the center of King street. It is about ninety-three feet from the end of the present main to the corner of Mr. Draney's lot. It is about one hundred and five feet to a point in Innis avenue opposite the south side of his house. The other distances may be readily calculated from those already stated. There are no houses fronting on Innis avenue for a considerable distance north of King street except those of the complainants, but about one-half mile farther north there is a considerable real estate development and a number of houses have already been constructed. If these are to be supplied with gas, the natural course of the main would be through Innis avenue. The premises of the complainants are on the east side of the avenue. The land on the west side, north of King street, is owned by the city and will be used for public purposes. It may be assumed that there will not in the future be any demand for gas from consumers north of King street on the west side of Innis avenue, and that in the immediate future there will

be no demand from consumers on the east side north of King street except by the three complainants, unless it should be from the owners of premises in the developing territory heretofore mentioned. The consumption of gas by the three complainants is estimated at ten thousand cubic feet per year each. The tariff rate is \$1.25 per thousand.

The only specific statutory provision is found in section 62 of the Transportation Corporations Law, as follows:

§ 62. *Gas and electric light must be supplied on application.* Upon the application, in writing, of the owner or occupant of any building or premises within one hundred feet of any main laid down by any gas light corporation, or the wires of any electric light corporation, and payment by him of all money due from him to the corporation, the corporation shall supply gas or electric light as may be required for lighting such building or premises, notwithstanding there be rent or compensation in arrears for gas or electric light supplied, or for meter, wire, pipe or fittings, furnished to a former occupant thereof, unless such owner or occupant shall have undertaken or agreed with the former occupant to pay or to exonerate him from the payment of such arrears, and shall refuse or neglect to pay the same; and if for the space of ten days after such application, and the deposit of a reasonable sum as provided in the next section, if required, the corporation shall refuse or neglect to supply gas or electric light as required, such corporation shall forfeit and pay to the applicant the sum of ten dollars, and the further sum of five dollars for every day thereafter during which such refusal or neglect shall continue; provided that no such corporation shall be required to lay service pipes or wires for the purpose of supplying gas or electric light to any applicant where the ground in which such pipe or wire is required to be laid shall be frozen, or shall otherwise present serious obstacles to laying the same; nor unless the applicant, if required, shall deposit in advance with the corporation a sum of money sufficient to pay the cost of his portion of the pipe or wire required to be laid, and the expense of laying such portion.

The Commission has held that this imposes an absolute obligation upon the gas company to furnish service, subject to the conditions expressed, within one hundred feet of its main, and that beyond that distance the Commission may require service to be rendered upon reasonable conditions.

Simpson et al. v. Buffalo Gas Company, II P. S. C., 2nd D., N. Y., 531. The last clause of the section quoted provides that the corporation shall not be required to lay service pipes "unless the applicant, if required, shall deposit in advance with the corporation a sum of money sufficient to pay the cost of his portion of the pipe or wire required to be laid, and the expense of laying such portion". What the consumer's portion shall be is nowhere defined, but the statute evidently contemplates that some portion of the expense shall be borne by the consumer. It follows that whether the distance be more or less than one hundred feet, the Commission has authority to require service to be furnished if it be reasonable so to do and upon reasonable terms. If the consumer is expected to pay any portion of the expense within one hundred feet, he should be expected to pay some portion of the expense if he is more than one hundred feet from the main. The portion by him to be paid is not fixed by law, so that in case of controversy it becomes the duty of the Commission to determine what portion is reasonable. In *Simpson et al v. Buffalo Gas Company, supra*, it was held that a reasonable division is that the company pay the cost of the pipe and the laying of the same from the main to the curb, and the consumer from the curb to the meter. In general, but subject to exception under special circumstances, that division of the cost, for the reasons stated in the Buffalo case by Commissioner Olmsted, is fair and equitable. We think that in cases beyond the one hundred feet limit the Commission must determine, first, whether it is reasonable to require service to be rendered; and next, upon what terms it should be rendered. Within the one hundred feet the only question is as to the portion of the cost of pipe and laying the same to be borne by the consumer.

In this case the Commission is of opinion that the complainants may reasonably demand that service be given, and the respondent practically concedes this by its offer to furnish service on terms which if they be not reasonable are cer-

tainly not prohibitive. The complainants' premises are on a street supplied to within a short distance by means of a four-inch main. Mr. Draney is immediately across a street, the occupants of houses on the other side of which are already supplied. The distance from Mr. Draney's premises to the premises of the other complainants are common distances between houses in a city of the class of Poughkeepsie. The probable consumption, while not promising great remuneration to the company, is not inconsiderable. Gas corporations in the performance of their public duties must and do, and this company undoubtedly does, furnish its service to a number of consumers under like conditions.

In determining upon what conditions the service should be rendered, a more difficult question is presented. The respondent submitted to the complainants two propositions: One was that the complainants should pay \$270 which should be reimbursed by credits for gas consumed during a period to be mutually agreed upon; the other was that instead of extending the four-inch main as contemplated by the first proposition, it would extend a two-inch service pipe to be paid for absolutely by the complainants. There was later a third proposition, to extend pipe upon a guarantee of \$48 a year consumption by each consumer.

The tariff of the company filed with the Commission, P. S. C., 2 N. Y., No. 1, contains the following:

Whenever the company is called upon to extend its mains . . . the company shall be entitled to increase the consumer's guarantee or to make adequate charge to offset expenditures involved. No positive rule can be given as each case must be determined on its individual merits. . . . The company will charge for gas service pipe installation from main to meter, not exceeding cost thereof.

It may be assumed that the calculations upon which the propositions were made were based upon the cost of extension of main and the cost of service pipe from the present main, and were therefore based upon the public tariff of the company. We think, however, that this tariff, so far as it

imposes upon the consumer the cost of service pipe from main to meter, is not reasonable, and that consumers should pay only for cost of pipe and cost of laying the pipe from curb to meter. It is quite true that in the matter of extensions it is not practicable to lay down any general rule, and the company's tariff, recognizing that fact and making the cost depend upon the "individual merits" of the case, is proper.

In the present case the service may be rendered either by extending the main along Innis avenue in front of the premises of the complainants and then laying service pipes, or by laying service pipe sufficient to supply service to all three consumers from the end of the present main. It should be left to the company to determine which of these methods it should pursue. Under the particular facts of this case it is reasonable to require that service be rendered the complainants, and that by some method the respondent shall, at its own expense, lay a pipe or pipes to points in front of complainants' premises, and that it bear the expense of purchasing and laying such pipe or pipes; but that, as a condition of so doing, it may require the complainants to deposit with the company the estimated cost of pipe and laying the same from the curb in Innis avenue to the meters to be installed on complainants' premises.

All concur.

In the Matter of the Complaint of the FULTON LIGHT, HEAT AND POWER COMPANY *against* GRANBY PULP AND PAPER COMPANY; ARROW HEAD MILLS, INC.; OSWEGO RIVER POWER TRANSMISSION COMPANY; NIAGARA, LOCKPORT AND ONTARIO POWER COMPANY; and NELSON L. WHITAKER, as to alleged violation of law, particularly the Public Service Commissions Law. [Case No. 5532.]

1. Subdivision 13 of section 2 of the Public Service Commissions Law defining electrical corporations is to be construed in connection with section 1 and all other provisions of the law.

2. So construed, a manufacturing corporation does not assume to act as an electrical corporation by generating electric current solely for its own use and transmitting it across a street or across other public property.

3. A permit granted by municipal authorities to maintain a wire or wires across a public street, or by the Superintendent of Public Works to maintain such a wire over state lands, for the purpose solely of transmitting current generated by the grantee for his own use is not such a franchise as requires the consent of the Public Service Commission to its exercise.

Decided October 10, 1916.

Appearances:

Gannon, Spencer & Mitchell (by Mr. Gannon), Syracuse, N. Y.; *G. M. Fanning*, and *C. A. Collin*, for Fulton Light, Heat and Power Company, complainant.

George M. Burt, Oswego, N. Y., for Granby Pulp and Paper Company.

Visscher, Whalen & Austin (by Mr. Whalen), Albany, N. Y., for Arrow Head Mills, Inc., and Nelson A. Whitaker.

Eugene M. White, 721 University Building, Syracuse, N. Y., for Oswego River Power Transmission Company.

Strebel, Corey, Tubbs & Beals (by Warren Tubbs), Marine National Bank Building, Buffalo, N. Y., for Niagara, Lockport and Ontario Power Company.

IRVINE, *Commissioner*:

This complaint of the Fulton Light, Heat and Power Company against the several respondents named in the caption apparently originated under a misapprehension as to the facts, but it has continued under what the Commission believes to be a misapprehension of the law.

The Fulton Light, Heat and Power Company is in the exercise of franchises for furnishing light, heat, and power in the city of Fulton. The complaint is framed upon the theory and in brief charges that the Granby Pulp and Paper Company, claiming to be the owner of certain water-power in the Oswego river, has entered into arrangements with some or all of the other respondents whereby a transmission line is to be constructed across a highway in the city of Fulton, and over certain lands belonging to the State and constituting a part of the canal system, for the purpose of transmitting and distributing electric current and power to be generated by the Granby Pulp and Paper Company and to be supplied to all or some of the respondents. The Granby Pulp and Paper Company and the Arrow Head Mills, Inc., are manufacturing corporations. The Oswego River Power Transmission Company and the Niagara, Lockport and Ontario Power Company are electrical corporations, but without authority to sell or distribute electricity in the city of Oswego. The prayer is "that said parties be summoned to appear before your honorable body with a view to securing relief to which it [the complainant] is entitled".

On the hearing it appeared that there is, near the Oswego river, in the northerly part of the city of Fulton, a paper mill formerly belonging to the Battle Island Pulp and Paper Company. This property was sold at judicial sale to N. L. Whitaker, one of the respondents. A water-power formerly used by the Battle Island company was made unavailable by barge canal construction, and the Granby Pulp and Paper Company leased certain land and water-power rights in the southern part of the city of Fulton to Whitaker. Whitaker

obtained the consent of the Board of Public Works of the City of Fulton to construct a transmission line under a bridge whereby Oneida street, a public street in the city, is carried across the Oswego river. The proposed transmission line would extend from the proposed power house, over lands of the Granby Pulp and Paper Company, under this bridge, to lands of the State, and over such land to the property formerly belonging to the Battle Island company. Consent of the Superintendent of Public Works was obtained for the construction of a transmission line over the state land. Whitaker transferred the pulp mill, the lease from the Granby Pulp and Paper Company, and the rights, such as they may be, obtained from the Board of Public Works of the city, and the Superintendent of Public Works of the State, to the Arrow Head Mills, Inc. It was stipulated on the hearing on behalf of the Arrow Head Mills, Inc., that the transmission line "is to be used exclusively for the purpose of transmitting electricity by the Arrow Head Mills, Inc., on its own line to its own plant, strictly and solely for its own use and its own purpose, and no other; and that no other electricity shall be transmitted over this line except what is generated at that plant," under the lease from the Granby Pulp and Paper Company aforesaid. Whitaker's position is merely that of the original lessee and grantee of the privileges mentioned, and he has transferred them to the Arrow Head Mills, Inc. The Oswego River Power Transmission Company and the Niagara, Lockport and Ontario Power Company disclaimed any relation with the transaction, and any existing or contemplated contract or arrangement with any of the other parties. The contention of the complainant under the facts thus developed resolves itself into the following proposition, stated by the sitting Commissioner at the hearing and accepted by the complainant as a correct statement:

"A person or corporation generating electricity for his own use endeavors to become an electrical corporation within the

meaning of the Public Service Commissions Law if his line crosses public property; and further, that in this case the crossing as indicated under this bridge is a crossing of a street, and the carrying of your line along state land is not carrying over private property but over public property."

It may be assumed that the crossing under the bridge is a crossing of a street, and that carrying the line over state land is not carrying it over private property. It may also be assumed that a corporation, in order to exercise the powers conferred upon electrical corporations within the meaning of the Public Service Commissions Law, must be incorporated under the Transportation Corporations Law. It is conceded that the Arrow Head Mills, Inc., is not so incorporated. The questions to be determined are therefore —

1. Whether the proposed construction and operation are *ultra vires* of the Arrow Head Mills, Inc., so that it can not accept a franchise of privilege for the proposed construction; and

2. Whether the privileges accorded by the Board of Public Works of Fulton, and the Superintendent of Public Works of the State, are such franchises or privileges as require the approval of the Commission under section 68 of the Public Service Commissions Law as a condition precedent to their exercise.

Section 2, subdivision 13, of the Public Service Commissions Law, is as follows:

13. The term "electrical corporation," when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever (other than a railroad or street railroad corporation generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others) owning, operating or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad or street railroad purposes or for its own use or the use of its tenants and not for sale to others.

This subdivision, taken by itself, would be susceptible of

the construction that the phrase "solely on or through private property" relates to use "for railroad or street railroad purposes," and is not to be connected with the following phrase "for its own use or the use of its tenants and not for sale to others". Known facts in connection with the history of the legislation would support this construction. However, subdivision 11, defining a "gas corporation," declares that the term "includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any gas plant except where gas is made or produced and distributed by the maker on or through private property solely for its own use or the use of its tenants and not for sale to others". Subdivision 22, defining a "steam corporation," is in similar language.

Standing on the definition alone, it would therefore seem that instantly a manufacturing corporation strung a wire across a public alley for the purpose of transmitting electric current from one of its buildings to another and for its private use, it assumed to act as an electrical corporation; that, not being incorporated under the Transportation Corporations Law, such act would be *ultra vires*; and that such simple and not uncommon operation could, perhaps, be legalized only through the device of a separate corporation. It would also follow that an individual owning buildings on both sides of such a public alley could not supply the one with electric light from current generated by himself in the other without becoming an electrical corporation, obtaining the consent of this Commission, filing reports and tariffs, and doing other things absolutely absurd in the circumstances. We should not attribute to the Legislature the intent to produce such results unless such intent is plainly manifest from consideration of the entire act and indeed of all existing legislation relevant to the subject.

Section 1 of the Public Service Commissions Law is as follows:

This chapter shall be known as the "Public Service Commissions Law," and shall apply to the public services herein described and to the commissions hereby created.

Section 2 is a section of definitions, including those already quoted. In its fifth subdivision, in defining a street railroad, it restricts such definition to roads "for public use in the conveyance of persons or property for compensation". Subdivision 6, defining railroads; and subdivision 9, defining common carriers, contain the same restrictions. Subdivision 11, defining gas corporations, does not. Subdivisions 17 and 19, defining respectively telephone corporations and telegraph corporations, restrict the definitions to such persons or corporations as transact the business defined "for hire". Subdivisions 22 and 23, defining steam corporations and stock yards, do not contain similar restrictions. Some of the subdivisions making definitions omitting all reference to public use have been added since the act was originally passed. The others have been amended. While it might be argued with considerable force that the insertion of restrictive words such as "for public use" or "for hire" in some definitions, and their omission in others, indicated a legislative intent to embrace all enterprises of the latter class whether for public service or not, a consideration of other features of the law rebuts any such inference. Section 1 says that the law shall apply to the "public services herein described"; so at the outset public service and not private use is made the subject of the act. All the provisions of the act relate to public service.

Article 4, relating to gas corporations and electrical corporations, begins with section 64, providing that "This article shall apply to the manufacture and furnishing of gas for light, heat or power and the furnishing of natural gas for light, heat or power, and the generation, furnishing and transmission of electricity for light, heat or power". Manufacturing or furnishing for or to whom? The subsequent sections answer the question. Section 65 requires gas corporations and electrical corporations to provide safe and ade-

quate service at just and reasonable prices, without unjust discrimination or preference. Section 66 gives the Commission authority to supervise such corporations and their instrumentalities; to fix standards for measuring the purity of gas, and for investigation of the efficiency of gas and electric plants; to prescribe methods of keeping accounts, and to require the filing of detailed reports; to require gas corporations and electrical corporations to file with the Commission and to keep open to public inspection schedules showing all rates and charges. Section 67 provides for the inspection of gas and electric meters; section 69 for the approval of stock, bonds, and other forms of indebtedness.

Without continuing this review, it is sufficient to say that every section is framed with a view to the public character of the service rendered by the corporation and to the protection of the public with reference thereto. We might review other articles relating to other classes of corporations and the result would be precisely the same. It may be within the power of the Legislature to provide for the minute regulation of boilers and pipes for the purpose of heating a private building by steam, or of an interior telephone plant for the purpose of affording communication between different parts of the same factory. If, however, the Legislature saw fit to exercise such power, it would not be by the requirement of financial reports and published tariffs, or inhibition of unjust discrimination. The very name of the law restricts it to public service, and the first section confines its operation to the public services to be defined in section 2. Every definition in section 2 must be read in connection with the first section and the avowed and evident purpose of the act. We therefore conclude that the Arrow Head Mills, Inc., does not assume to act as an electrical corporation in generating its own electric current for its own use merely because of the fortuitous circumstance that its transmission line must pass under a public bridge and over state land.

What has already been stated answers in substance the

second question. By enacting the Public Service Commissions Law, the Legislature did not intend to create a body to supervise municipal authorities in their control of public streets, or state officers in the control of lands under their authority. The requirement for the approval of franchises was inserted only in connection with the regulation intended by the act of persons or corporations engaged in public service. If the municipal authorities should grant a license or consent to carrying a pipe under a public street for the purpose of supplying a house on one side with water taken from a well on the other, the Commission would have no authority in the premises. If an electrical corporation, in erecting a new building for its offices, should obtain the consent of the municipality to construct a marquee over the sidewalk of a street, the Commission would be equally unconcerned. It is the public use or public purpose that brings the transaction within the control of the Commission, and not the fact that public property is used for an entirely private service. The service here contemplated is strictly private. It has no public aspect, and this Commission can not concern itself over any use that the City of Fulton or the Superintendent of Public Works may permit of city streets or state property when such use has no connection with the purpose for which the Public Service Commissions Law was passed.

The complaint, as already shown, contains no specific demand for relief. It is unnecessary to inquire what relief in other circumstances might be accorded. In the circumstances disclosed in this case, no relief whatever can be given. If subsequently the line should come to be used for public purposes, the authority of the Commission may then be invoked.

All concur.

In the Matter of the Application of NIAGARA RIVER & EASTERN RAILROAD COMPANY, INC., for a certificate of public convenience and a necessity under section 9 of the Railroad Law; and for permission and approval to exercise its franchises and for leave to commence construction under section 53 of the Public Service Commissions Law; and for a determination as to the method of crossing streets, avenues, highways, and roads in accordance with the provisions of section 89 of the Railroad Law. [Case No. 4555.]

Section 9 of the Railroad Law provides, among other things, that no railroad corporation formed after May 18, 1892, shall begin the construction of its road until the Public Service Commission shall certify . . . that public convenience and a necessity require the construction of the railroad as proposed in the certificate of incorporation of such railroad corporation.

The Niagara River & Eastern Railroad Company, Inc., was duly incorporated on or about October 1, 1914, and shortly thereafter made application to the Public Service Commission for the certificate of public convenience and a necessity as provided by section 9 of the Railroad Law; the proposed route of the applicant's certificate of incorporation as running from a point on the line of the Buffalo, Lockport and Rochester Railway Company's right of way, in the city of Lockport, near the easterly boundary of said city of Lockport, in the county of Niagara, New York, to the easterly bank of the Niagara river, in the town of Lewiston, Niagara county, New York, which places will be its termini, and the length of said road will be twenty miles.

The proof in the case shows that the applicant relies for a large part of its business upon a connection to be made with a Canadian trans-continental railroad which is planned to be brought across the Niagara Gorge by a bridge to be constructed by The Ontario-Niagara Connecting Bridge Company. It is claimed, also, that by forming a connecting link between the Buffalo, Lockport and Rochester road, around the easterly and southerly sides of the city of Lockport, and the tracks of the International railway at Hinman, which would be about four miles of the easterly end of the proposed route, a large freight traffic would be accommodated, and a necessary outlet for the Buffalo, Lock-

port and Rochester provided; these claims seem to be well supported by the evidence in this case. It is not seriously contended that the sixteen miles of rural territory between Hinman and the Niagara river requires the building and operation of this railroad because the proposed route parallels the New York Central railroad for almost the entire distance. The bridge is not yet constructed nor even commenced, and the Canadian railroad is no nearer the Gorge than eighty miles, with no prospect for its extension in the immediate future. Under these circumstances, the Commission has been asked to grant a certificate of public convenience and a necessity herein under section 9 of the Railroad Law, so that the construction of the railroad can be made for the four miles around Lockport to Hinman, but to hold for future consideration the route westerly from Hinman, until such time as the Canadian railroad shall be brought to the Niagara river, and the bridge project ready to be carried out. This is, in effect, a request that the Commission divide the proposed route of the railroad, and grant a certificate for a part only of such route.

Held: That the Commission is without legal authority to divide the route proposed by the applicant, and grant a certificate of public convenience and a necessity for any part of such route, or to grant such certificate conditioned upon the happening of any future event.

Also Held: That the applicant has failed to show that public convenience and a necessity require the construction of a railroad as proposed in its certificate of incorporation.

Application denied.

Decided October 11, 1916.

Appearances:

Dudley and Gray, Niagara Falls, attorneys for the petitioner.

Charles Hickey, Lockport, president of the petitioner.

Ramsdale and Church, Albion, attorneys for The Ontario-Niagara Connecting Bridge Company.

William Nottingham, Syracuse, attorney for Buffalo, Lockport and Rochester Railway Company.

Fred D. Corey, Buffalo, president of the Niagara, Lockport and Ontario Power Company.

George A. Brock, Mayor of the City of Lockport.

William Laughlin, Mayor of the City of Niagara Falls.

350 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

M. A. Federspiel, Lockport, attorney for property owners in Lockport.

William W. Storrs, Lockport, attorney for property owners in Lockport.

Charles E. Dickinson, Lockport, industrial agent for the City of Lockport.

W. Harrison Upson, *William A. Williams*, *George T. Lennon*, and *William A. Dickinson*, officers of the Lockport Board of Trade.

John R. Earl, *Joseph Turner*, *John Mann*, and *E. H. Babbitts*, officers of the Lockport Chamber of Commerce.

William E. Lochner, Lockport, attorney for property owners in Lockport.

Abner T. Hopkins, Lockport, attorney for property owners in Lockport.

E. J. Emmert, Lockport, chairman Board of Supervisors, Niagara County.

Roy H. Ernest, Lockport, attorney for property owners in Lockport.

F. S. Johnson and *F. R. Sanborn*, committee representing Village of Sanborn.

E. S. Moore and *Jesse Peterson*, property owners in Lockport.

Hoyt and Spratt, Buffalo, attorneys for The New York Central Railroad Company, opposed to application.

HODSON, Commissioner:

This case involves the application of the Niagara River & Eastern Railroad Company, Inc., under section 9 of the Railroad Law, for a certificate of the Commission that all the conditions of said section have been complied with, and that public convenience and a necessity require the construction of the railroad as proposed in the applicant's certificate of incorporation: under section 89 of the Railroad Law for a determination as to the method of crossing the streets, avenues, highways and roads proposed to be crossed by said rail-

road; and under section 53 of the Public Service Commissions Law for permission to begin construction of said railroad and exercise the franchises therefor.

The route of the proposed railroad, as shown by such certificate of incorporation, begins at "a point on the line of the Buffalo, Lockport and Rochester Railway Company's right of way in the city of Lockport, near the easterly boundary of said city of Lockport, in the county of Niagara, New York, and runs to the easterly bank of the Niagara river, in the town of Lewiston, Niagara county, New York, which places will be its termini, and the length of said road will be twenty miles". This statement complies with the statute as to the route of the proposed railroad, its length and termini; and it may be stated here that the applicant has duly complied with all the requirements of section 9 of the Railroad Law, concerning the publication of its certificate of incorporation, and the proof thereof, which has been filed with the Commission, is satisfactory.

The proposed route of such railroad as above set forth, gives only the general direction from one terminus to the other, but the petition in this case discloses the specific plans of the company, and shows the particular territory intended to be traversed. It appears from such petition that the route will begin at a point in the city of Lockport, on the east and west right of way of the Buffalo, Lockport and Rochester Railway Company, at or near the intersection of such right of way with the north and south highway known as Lover's Lane, and extending in a southerly direction along said highway to a point at or near where Mulberry street would intersect said highway, if extended; thence in a southwesterly direction across High street and Akron street, intersecting said streets at a point east of Hickory street; thence in a southwesterly direction to Lincoln street; thence westerly on Lincoln street and Summit street to and across the Erie and Barge canals; thence in a southwesterly direction to a point on the right of way of the Niagara, Lockport and Ontario Power Company, at or near the intersection of said last

named right of way with the Buffalo and Lockport Railway Company; thence in a westerly direction along said right of way of the Niagara, Lockport and Ontario Power Company to the easterly bank of the Niagara river. This was further amplified by the proof in the case, and the record clearly shows that the proposed railroad is to be constructed from a connection with the Buffalo, Lockport and Rochester railway in the easterly part of the city of Lockport, thence going a distance of about four miles around the southeastern part of the city to Hinman, which is located on the westerly side of Lockport; from Hinman it will continue in a westerly direction through the towns of Lockport, Cambria, Wheatfield, and Lewiston, to a point about four hundred feet from the east bank of the Niagara Gorge, at or near the Devil's Hole, so called, where The Ontario-Niagara Connecting Bridge Company contemplates the construction of a railroad bridge across the Gorge, thus connecting the United States and the Dominion of Canada. Further details of the applicant's plans include the changing of the route around the city of Lockport so as to avoid the occupation of public streets, except at crossings. There would be several of such crossings, seven of which are located on the route between the easterly terminus of the road and Hinman, and all of them at grade, and one of these is known as the Transit Road, which is one of the important state highways in Western New York, leading into the city of Lockport from the territory around Buffalo. For the remainder of the route, consisting of about sixteen miles, there are upward of ten other highway crossings, all of which will be at grade except two which will be overhead, and the railroad is planned to be taken across the boulevard between Niagara Falls and Lewiston by an under-pass. The railroad is to be carried over the Barge canal by a bridge about two hundred and fifteen feet long; this canal crossing will be about half a mile south of the city of Lockport and east of Hinman. There will be two overhead crossings of the Lockport branch

and the Niagara Falls branch of the New York Central railroad between Hinman and the Gorge, with a clearance of twenty-three feet in each case, and the crossing of the electric railroad of the International at Hinman will be at grade, and a connection made with said railroad at that place for the interchange of passengers and freight. At the river bank are located the Rome, Watertown and Ogdensburg and the Lewiston branches of the New York Central railroad, and the Gorge trolley line; the first of said roads is on the top of the bank, the Lewiston branch is about half way down, and the Gorge road runs along the river. The easterly bridge approach is to be located by the Secretary of War, and when so located, will under-cross the Rome, Watertown and Ogdensburg railroad and conveniently cross over the other two roads. The applicant intends to then make its westerly terminus coincide with the easterly terminus of the tracks on the bridge, and make connection therewith; and such bridge railroad will also have convenient connections at its Canadian approach with one of the trunk line railroads of the Dominion, known as the Canadian Northern, which, it is claimed, has planned to extend its road from its present easterly terminus at Toronto to the Niagara escarpment, there connecting with the Ontario and Niagara Connecting Bridge, and thus meeting the plans of the applicant to establish a through line from the Canadian Northwest to and through Niagara Falls and Lockport, and on to points along the Buffalo, Lockport and Rochester railway and through the State of New York to the Atlantic Seaboard, which would be of great value and importance in the transportation of freight. The right of way for the railroad of the applicant between Hinman and the river is fifty feet wide, and has already been contracted for with the Niagara, Lockport and Ontario Power Company, whose land is three hundred feet wide.

The topography of the land between these points is such that there would be little necessity for cutting and filling,

except at the overhead crossings, and there are no large streams to cross.

There is but one steam railroad operating between Lockport and Niagara Falls, and that is known as the Niagara Falls branch of the New York Central railroad, and occupies substantially the same territory as the road of the applicant would serve; this line continues from Lockport to Rochester through many of the same towns and villages which are traversed by the electric line of the Buffalo, Lockport and Rochester Railway Company, although, at certain points, the two roads are a considerable distance apart.

The passenger cars of the Buffalo, Lockport and Rochester Railway Company run through the city of Lockport, and then go over the International railway to the city of Buffalo. The International Railway Company operates the Lockport branch of the Erie railroad between Buffalo and Lockport, and at North Tonawanda this line crosses and is connected with the International railway, running from Buffalo to Niagara Falls.

The Rome, Watertown and Ogdensburg branch of the New York Central railroad runs north from Niagara Falls to and along the southern shore of Lake Ontario, about eight miles north of the Falls branch. The Buffalo, Lockport and Rochester railway is not a steam railroad; neither is it a street surface railroad as defined by the Railroad Law; but it is a railroad, and has been operated as such for many years, its motive power being electricity. It runs from the city of Lockport to a point about two and a-half miles from the city of Rochester, a distance of more than fifty miles, through the great fruit belt of New York state, in the counties of Niagara, Orleans, and Monroe. Its corporate name implies that the road connects Buffalo with Rochester, but it does nothing of the kind. It does not enter either city. Why the road was not originally built so that its route would be coincident with its name has not been explained. Perhaps the reason is found in the fact that at both termini it has

convenient trolley connections for the transportation of passengers to both cities; while at the Rochester end there is also a connection with the steam railroad of the Buffalo, Rochester and Pittsburgh Railway Company, and at Lockport it has like facilities furnished by the International railway in its relations with the Erie railroad, and in some measure, it may be said, interchange facilities for both passengers and freight are thus afforded.

It is true that the road has not made any great effort to secure the freight business in the territory contiguous to its line, largely because such business has been centered in the various villages which have been conveniently served by the New York Central railroad. But of late years the fruit growing and shipping interests in that vicinity have developed to such an extent that now there are demands at almost every point along the railroad to furnish facilities for the prompt shipment of such fruits and other products to the market; and this demand is increasing every year. Auto trucks are used in great number during the shipping season, but they are employed almost entirely for short hauls to nearby markets.

Under these circumstances, the Buffalo, Lockport and Rochester Railway Company has wisely determined that there can be no better way to supply those connections and facilities which will be adequate for its present and prospective needs than to do what it should have done in the first instance, and extend its road to both Buffalo and Rochester; or, failing in that, to lend its aid to such projects as will give the same benefits and privileges. That is just what has been done in this case, and also in Case No. 5053, which involves the petition of the Rochester Connecting Railroad Corporation for a certificate of public convenience and a necessity and for permission to construct a railroad which will connect the city of Rochester with the easterly terminus of the Buffalo, Lockport and Rochester railway. In both these cases, the last named company and many of its large

stockholders and bondholders are earnestly supporting the claims of the petitioner, and they are also directly interested in the petitioner as stockholders and promoters. Indeed, there can be little doubt but that, although the ostensible purpose in these cases is to construct and operate independent lines of railroad, the main object is to supply an outlet at both ends of the Buffalo, Lockport and Rochester railway, so that such railway may be connected with the outside world; and if the petitioner in this case had sought only for authority to build to Hinman, which would afford direct connections with the International railway and Erie railroad, it is certain that the problem involved herein would be very much simplified. But the applicant does not stop here. The four miles of railroad between the westerly terminus of the Buffalo, Lockport and Rochester railway and Hinman is only a small part of the route of the proposed line, which would continue from Hinman in a westerly direction for sixteen miles to the Niagara Gorge, passing through parts of the towns of Lockport, Cambria, Wheatfield, and Lewiston, and the hamlets of Cambria and Sanborn. This stretch of sixteen miles is all rural territory and, excepting the two villages mentioned, each having about four hundred residents, there are very few inhabitants along the proposed railroad. The village of Pekin is near Sanborn, but away from this line, and also has a few hundred inhabitants. The proposed railroad would parallel the Niagara Falls branch of the New York Central railroad the entire distance from Lockport to Niagara Falls except between Sanborn and the Niagara river where it would occupy a territory not now served by any railroad, a distance of about two miles. The point reached at the Niagara river by the proposed line is about two miles away from the north end of the city of Niagara Falls, where the present suspension bridges are located, and this part of the city is known as the Railroad section, which is two miles or more from that portion of the city formerly designated as the village of Niagara Falls, and that locality contains the

greater number of inhabitants, all the important hotels, and a majority of the manufacturing and industrial plants of the city, and here, also, are the world famed Niagara Falls. The westerly terminus of the proposed road would be a considerable distance north of the Niagara Junction railroad and the electric lines leading into the city of Niagara Falls, and no definite provision is made for connection with either road, although it is planned to reach one or the other in some convenient way so as to give passenger and freight service into the city proper.

So far as passenger traffic is concerned, the Buffalo, Lockport and Rochester Railway Company now has such established facilities that through passengers may travel between Buffalo and Rochester without change of cars, and like accommodations are afforded between Rochester and Niagara Falls, except that a change must be made at either Lockport or North Tonawanda to the International, and even this inconvenience could be obviated by a trackage arrangement between the two companies, the same as exists for the Buffalo-Rochester trip. The further point is made that the new line would reduce the distance between Lockport and Niagara Falls about four miles. This is true so far as the north end of Niagara Falls is concerned; but for passengers desiring to be landed in that part of the city where the Falls are located and where the hotels may be conveniently reached, the present trolley accommodations are superior to those proposed by the applicant, and the difference in the time of travel is trifling.

The incorporators of the Niagara River & Eastern Railroad Company have paid in \$20,000 as their first subscription to stock, but no further obligation has been made by them or any other persons toward the \$1,500,000 necessary for the building of the road. This last amount is the estimate of the applicant's engineer for the cost of the road, exclusive of stations, rights of way, cars and equipment. These figures have been challenged by the engineer for the

contestant, The New York Central Railroad Company, and one of the applicant's witnesses gave his estimate at nearly \$2,000,000.

A witness called by the contestant agreed substantially with the applicant's estimates as to the cost of constructing the road, but added that the cost of locomotives, cars, stations, sidings, connections with the International and Niagara Junction railroads, would increase the sum to over two million dollars; and further testified that to build the road without any grade crossings along the line would swell the expenditure to \$4,609,440.

Indeed, if reliance should be had upon the estimates presented by the contestant, the mere building of the railroad would be far in excess of the figures given by the applicant, and the necessary re-location, detours, and switch connections along the line of the Buffalo, Lockport and Rochester railway would entail an expense which would be a heavy burden upon that company. As to financing the Niagara River & Eastern Railroad Company, the record does not disclose any agreement on the part of any person to furnish the necessary moneys. The only evidence produced before the Commission on this important subject is found in the testimony of Mr. Frank A. Dudley, who presented certain letters and telegrams from three incorporators, which were claimed to be sufficient to show that those who sent them could be relied upon to furnish the necessary funds. Mr. Edward G. Connette of Buffalo, the President of the International Railway Company, stated that "when necessary consents from public authorities are obtained, I shall assist as far as possible in the financing of the proposition".

Mr. E. R. Wood of Toronto, a man of financial importance, telegraphed that "when the company secures the necessary rights and permission, I will be glad to assist in financing". Mr. Clifford D. Beebe of Syracuse, the president of a syndicate of electric railroads in Central New York, wrote that "*In re* financing of Niagara River and

Eastern Railroad, our associates in connection with New York, Buffalo, and Canadian interests will be prepared to carry our share of the cost of that enterprise”.

These communications, which are given *verbatim*, contain all the facts which may be claimed as a basis for any agreement, subscription, or obligation on the part of any person to assist in financing this project.

This is a bare statement of the proof in this case, as it relates to the economic questions involved, and does not reflect upon the financial ability or good faith of any of the gentlemen referred to, or of those whose names appear as incorporators of the applicant company.

The Governments of the United States and the State of New York have each indicated their approval of the bridge project by legislative enactment, proof of which was presented to the Commission during the taking of testimony, and since the close of the hearings, information has come to the Commission that the Parliament of the Dominion of Canada had also passed an enabling act for such purpose, and the same has been approved by the Governor-General. Nothing now stands in the way of erecting the bridge, and of carrying that particular project forward to completion, so that those interested in the proposed bridge may reap the reward which they claim awaits them, by promptly taking advantage of the authority granted by the governments on both sides of the International line. But the bridge has not been built, nor have any steps been taken in that direction save only the procurement of the governmental permits above mentioned. The bridge provided for in these legislative acts is to be for railway and general traffic, and the evidence in this case shows that it is intended to span the Niagara river at its narrowest point, at or near the Devil's Hole, so called, connecting on the west with the Canadian Northern Railway, a transcontinental Canadian line, which now extends from the Pacific coast to Toronto, and on the New York side of the river with this proposed railroad. It has

been sufficiently shown that the Canadian Northern is a large freight carrying road, and its traffic, or some considerable portion thereof, destined to the Atlantic Seaboard, or other points east of the Niagara Frontier, might reasonably be expected to go over the proposed railroad and its affiliated lines, and the estimated amount of the same at one hundred carloads a day does not seem extravagant. But how can such a thing be done when the Canadian Northern's present easterly terminus is Toronto, about eighty miles from the Niagara Gorge, with no assurance that an extension for that distance will ever be built, or, if built, how could the applicant expect any benefit from such traffic, with no bridge across the Niagara river?

These are very pertinent questions in this matter, and answers to them bear directly upon the inquiry which the Commission is required to make as to the convenience and necessity for the railroad sought to be constructed.

Counsel for the applicant, and others who have appeared and urged affirmative action in this matter, have presented the case as combining all these features, and each one of importance to the main proposition. It has not even been suggested that the building of this line within its prescribed route between Hinman and the Niagara river is called for by any public demand, or that it would be feasible in any sense, without the expected business from the far west by way of the Canadian Northern and the bridge. And it can not be reasonably claimed that the territory between the termini of the proposed route, standing alone, would ever furnish sufficient business to justify the construction and operation of the road, especially as most of such territory is now adequately served by the New York Central line and its connections. Under these circumstances, it satisfactorily appears that such business, both incoming and outgoing, would be very meager. But even though it should be small in amount, it would become an important consideration in this case just as the applicant claims, if it could be coupled

with such business as could be carried to and through Niagara Falls, and augmented by actual traffic over the bridge from Canada. Those representing the applicant are confident in their opinions and positive in their assertions that in a short time the character of this locality would be changed by the building of this railroad, but the Commission is face to face with the bare facts as disclosed by the present political divisions and physical conditions of this sixteen miles of country. We can not accept such conclusion, which we believe is not supported by any substantial reasons. As evidence of the correctness of this statement it is only necessary to cite the fact that The New York Central Railroad Company, which traverses this very territory, has been patiently waiting for such development for many years, and at the time the proof was taken on the hearing, that company showed that its railroad, running between Niagara Falls and Rochester, and known as the Falls branch, is a little more than seventy miles in length, comprehending the entire distance and practically the same territory covered by the Buffalo, Lockport and Rochester railway and the proposed route of the applicant herein; that it is all double tracked except about twenty miles in the neighborhood of Middleport; that it has convenient terminals at Niagara Falls, Lockport, and Rochester, and possesses adequate connections with its other branches and other railroads at all of these places, and with its main line at Rochester, and both the Lockport branch and Falls branch reach the main line at Buffalo, where convenient switching and interchange facilities are had with all the important railroads running to and through New York state, from any point. Yet with all these opportunities for prompt and efficient service, it appears that there was very little difference in the carload traffic on the Falls branch of The New York Central Railroad Company in 1913 and 1914, it being 29,042 cars in 1913, and 28,701 in 1914; this includes both carload freight from the suspension bridges and local points; of these shipments only 279 cars

were transported from one point to another within the territory covered by the Falls road; there is included in the shipments given for the two years mentioned the stone carried from the quarries at Cambria and Gasport for the Lackawanna Steel Company and the Wickwire plant, both of which quarries are reached by switches from the New York Central railroad, and both being a long distance away from any other railroad; of the 29,042 cars carried over the Falls branch in 1913, there were 4169 routed west of Buffalo over the Lake Shore railroad which is now a part of the New York Central system; the number of cars destined for Buffalo was 8577, and of this number 6563 carried stone from the Cambria quarry for the Lackawanna Steel Company, and 389 for the Wickwire Steel Company from its Gasport quarry; all these stone shipments may fairly be classed as New York Central business, on account of the general situation of the quarries, the plants, and the switch connections with that railroad, and also because of the contractual relations which were shown to exist between the several companies. Taking these stone shipments of 6952 carloads from the total number of Buffalo cars handled on the Falls branch for the year 1913, it would leave only 1625 cars of all other kinds of freight which were transported over this branch to Buffalo; and even assuming that the applicant would be able to obtain a large percentage of this business,—or all of it,—the benefit to be derived would not be of much consequence.

Another computation of the carload traffic over this branch destined for Rochester and points east of that city is interesting; in 1913 there were 861 cars carried to Rochester and 11,918 beyond; more than 90 per cent of the latter shipments went to points reached by the New York Central lines; during the same year 490 cars were shipped west of Suspension Bridge to points in Canada, over lines having direct connection with the New York Central railroad. It is not deemed necessary to amplify the figures relating to the year 1914, for the reason that the traffic was about the same as

for the year 1913, and the divisions as to local and through freight, its character and destination, do not differ materially from the figures for 1913.

We have thus analyzed this evidence, taking the figures direct from the record, in order to show that the construction and operation of another railroad paralleling the Falls branch of the New York Central between Lockport and Niagara Falls would not be a good business venture, for the reason that there is not sufficient business in the territory to sustain it. Indeed, it is quite apparent that without its importance and necessity as a connecting link and feeder to the main line, the Falls branch of the New York Central Railroad would not be a success as an independent proposition.

It must be borne in mind that the statistics here given concerning the business and earnings of the Falls branch of The New York Central Railroad Company include its entire seventy miles of road between Rochester and Niagara Falls, which is more than the combined length of the proposed road of the applicant and the Buffalo, Lockport and Rochester railway, because the latter does not reach within two and one-half miles of the city of Rochester; and, besides, it serves the fruit section of Niagara, Orleans, and Monroe counties, and has switches, sidings and freight shipping facilities in all the municipalities through which the Buffalo, Lockport and Rochester railway is operated, in addition to its manifold conveniences in all the cities along the line. If The New York Central Railroad Company, with all its facilities and connections with its main line and other railroads, is unable to obtain a greater amount of business than has been shown to exist in the localities selected by the applicant for its route, it is difficult to understand how the projectors of the new road can come into this field and expect to thrive. Of course, it is conceded that the fruit shipments will gradually increase and probably double within the next few years; but such an item of business would be inconsiderable

when dealing with a project requiring millions of dollars of initial expenditure and a vast sum of money for fixed charges and operating expenses.

In other words, it is believed that the business which could be obtained by the applicant in the territory between Lockport and Niagara Falls would be negligible in amount and value, and the traffic derived from the Buffalo, Lockport and Rochester railway could not be expected to be any better, in the absence of suitable facilities for shipments to and through Buffalo and Rochester, and across the Niagara river to Canadian points. And this discussion thus brings us to a plain statement of the fact that the connection of the Buffalo, Lockport and Rochester line with the International and Erie at Hinman with opportunities for shipments to and beyond Buffalo, and the traffic which would be received from Canada, with the Canadian Northern brought to the Gorge, and with the bridge in existence, and the further outlet for freight destined for Canada, together constitute the important and valuable features of the plans presented in this case, and must be treated accordingly by the Commission. During the oral argument it was intimated to counsel for the applicant that this was the view of the Commission, at least so far as the connection at Hinman was concerned; immediately the plans of the applicant were changed and considerable correspondence followed with reference to granting the certificate of necessity for only that part of the route between the westerly terminus of the Buffalo, Lockport and Rochester railway east of Lockport, and the junction with the International-Erie tracks at Hinman; and in furtherance of this, the applicant filed with the Commission, January 19, 1916, a duly executed stipulation by which it waived its right to an immediate determination of the mode of construction of said proposed railroad from Hinman westerly to the Niagara river, and consented to hold that portion of the application herein for future consideration. Thus the Commission was asked to divide the route of the proposed railroad and grant

a certificate of public convenience and a necessity for only a small part of the route, consisting of about four miles around the easterly and southerly sides of the city of Lockport, so that such railroad could be constructed from the Buffalo, Lockport and Rochester railway to Hinman.

This presents a novel question, for it does not appear that it has ever before been considered by the Commission or passed upon by the courts. Perhaps this is not surprising in view of the very plain provisions of the law which govern the action of the Commission in cases of this kind, and which, apparently, have not required judicial construction. Section 9 of the Railroad Law provides that no railroad corporation formed in this State after May 18, 1892, shall begin the construction of its road until certain steps shall be taken with reference to the publication of its certificate of incorporation, nor until the Public Service Commission shall certify "that public convenience and a necessity require the construction of said railroad *as proposed in said certificate of incorporation*". The proposed route of this railroad as contained in the certificate of incorporation of the applicant is hereinbefore set out as running "from a point on the line of the Buffalo, Lockport and Rochester Railway Company's right of way in the city of Lockport, near the easterly boundary of said city of Lockport, in the county of Niagara, New York, to the easterly bank of the Niagara river, in the town of Lewiston, Niagara county, New York, which places will be its termini, and the length of said road will be twenty miles". More definite language could not have been employed for the purpose of fixing the points between which this road was to be built, than is used in the first part of such description; but to make assurance doubly sure, the description then states that the termini of the road will be the two places previously mentioned, and which are the easterly boundary of the city of Lockport and the easterly bank of the Niagara river with an intervening distance of twenty miles, which is also stated in said certificate as the proposed length of the

road. No other construction can be given to this language than that the applicant has thus proposed and defined the route of its railroad to run between these two points for a distance of about twenty miles, and it is equally plain that if the Commission should grant a certificate of public convenience and a necessity, it must be for such proposed route, no more, no less; and likewise if negative action should be taken, it must follow that the proposed route of the applicant should be disapproved in its entirety.

This proposition is strengthened, if need be, by a glance at the next succeeding section of the Railroad Law, for it is there specifically provided that upon an application to the Commission by a street surface railroad company for a certificate of public convenience and a necessity, under section 9 of the Railroad Law, the Commission is empowered to grant the certificate for a part only of the proposed route, and authorize the construction of a railroad over such part.

Obviously, if the Legislature had intended that the Commission should have this same power to divide the proposed route of a railroad, other than a street surface railroad, then section 9 of the Railroad Law would have been drafted with that end in view, and would not contain the express provision that a certificate of public convenience and a necessity should be based upon the proposed route of the railroad as laid out and defined in the certificate of incorporation. The Commission has no right to read into the law a provision which the Legislature has deliberately left out.

If this same authority which the Commission has with reference to the division of the route of a street surface railroad, had been intended as to any other railroad, there would have been unmistakable language indicating the same, and, in this respect, sections 9 and 10 of the Railroad Law would have been framed substantially alike; but as they now stand, they are totally different, and no process of reasoning can properly lead to a conclusion that the Commission has power to grant a certificate herein for the construction of a railroad

over a part only of the route indicated in the applicant's certificate of incorporation.

The Commission has been very much impressed by the extended, earnest and very able arguments of counsel for the applicant, which is supported in some measure by the evidence, maintaining that the matters involved in this project are of a public character; they have had the effect, to which they were certainly entitled, of inducing great caution and very mature deliberation concerning the legal questions with which this case abounds; beyond the exercise of such caution and deliberation this Commission can not go in support of the applicant's contention, for we are convinced that there has been no sufficient compliance with the law in showing that public convenience and a necessity require the construction and operation of a railroad over the proposed route, under the existing circumstances.

The evidence may be satisfactory to the projectors as showing an opportunity for the development of other enterprises, but it falls far short of proof of those facts which must exist before a certificate of public convenience and a necessity may properly be issued.

We have shown how important it would be to the applicant to have the Canadian Northern extended from Toronto to the Niagara Gorge, a distance of about eighty miles. But how is this to be accomplished? Probably not by the company itself, for it is well known that its road was built by government aid, and further financial assistance is expected for this construction. It is a matter of public knowledge that the Canadian Government is at present occupied with problems far more pressing and of greater importance than the extension of this railroad. Let us suppose, in this connection, that the application in this case should be granted; it can not be possible that any of the able and far seeing projectors would favor the construction and operation of the road over its entire route, until the Canadian Northern was actually brought to the Gorge, and across a bridge, so

that the Niagara and Eastern could receive benefits therefrom; and we believe this to be so because, as before stated, the proof in this case has clearly established that the traffic which might be reasonably expected to and from Canada, with the bridge and the extension of the Canadian Northern, coupled with the business to be obtained by a connection at Hinman with the International-Erie railroad, are the important features of the plans proposed by the applicant, and, together, would furnish their fair share of remuneration to a railroad such as the applicant proposes to build. But the Canadian road is not now at the Gorge; the bridge is not built; and there is no legal authority at this time to construct the four miles of road to Hinman. Such is the actual situation at this time, and its mere statement indicates that the plans of the applicant are based very largely upon that faith which has been aptly described as "the substance of things hoped for, the evidence of things not seen".

It has also been suggested that a certificate be granted conditioned upon the building of the bridge and extension of the Canadian Northern, and that no construction be permitted beyond Hinman until those projects became realities; there are several objections to this course, the chief one being that it would be utterly unlawful, for the reason that the action of the Commission is required to be taken upon the facts as they exist at the time the certificate is granted.

A further objection may be stated in the form of argument, that if the construction of the road is to be deferred until the happening of these events, and as they could not be realized within a year at least, then no harm can come to the applicant by a denial of the application herein, because the statute authorizes a renewal of the application after the expiration of one year from the date of an order of refusal by the Commission. This renewal may be for the whole of the original route, or, after proper proceedings being taken, may be for any part of such route; and, although no intimation is intended regarding any action to be taken on such

new application, there will undoubtedly be many important facts and circumstances then presented which are now absent.

There is another serious question in this case to which the parties have given very little attention, but which the Commission has viewed with great concern, and that is the matter of crossing nearly a score of public highways at grade along the route of this railroad, and several of these are improved and much traveled state roads.

It is the settled policy of the State that all existing dangerous crossings of railroads and highways at grade should be abolished. This plan comprehends the expenditure of vast sums of money, the greater part of which is contributed by railroads and the State. Millions of dollars have already been spent, and millions more will be spent in the future, for the elimination of those grade crossings which were established in the early years of railroad building. Having this in mind, it seems hardly consistent for the Commission to authorize such expenditures by the State, the municipalities and the railroads, for the purpose of removing these danger spots throughout the State, and at the same time permit the creation of new grade crossings by the wholesale, such as the applicant purposes in the construction of this railroad. The Commission does not pass upon this question in this case, because the decision here made is based upon other grounds; but it is deemed proper at this time to bring this very serious problem to the attention of the parties, to the end that, in the event of new proceedings being instituted for the construction of said railroad or any part thereof, some feasible plan may be devised whereby the grades of the railroad and the highways may be separated.

The performance of public duty is not always hand in hand with what might be one's sympathetic inclination if the question were considered alone in the abstract. And in a case like this, performance of such a duty may not be avoided because the result is at variance with the ardent desires and convictions of those who believe they should be

allowed, with their own money and at their own risk, to exploit what they consider to be essentially a public enterprise. Their argument in this respect of course appeals as one *ad hominem*; but not persuasively enough to overcome the requirements of the statute that this Commission shall find a necessity for a public utility before certifying that such necessity exists. It would be a satisfaction if the Commission were permitted to enter with generous coöperation into the plans of those who have this enterprise in hand, unhampered by any requirements or restrictions of the statute. But such a course can not, and should not, be taken. We should leave to no one our share of responsibility in this matter, by failing to make an unequivocal decision, which the law has imposed upon the Commission as one of its fundamental duties.

Upon the whole case, it is hereby found and determined —

First, that the Commission is without legal authority to divide the route proposed by the applicant, and grant a certificate of public convenience and a necessity for any part of such route, or to grant such certificate conditioned upon the happening of any future event;

Second, that the applicant has failed to show that public convenience and a necessity require the construction of a railroad as proposed in its certificate of incorporation;

Third, that the application herein should be denied.

All concur except Emmet, Commissioner, who files a dissenting opinion.

EMMET, *Commissioner*, dissenting:

This application aims partly at the establishment of a very desirable physical connection at Hinman between the Buffalo, Lockport and Rochester railroad and the International and Erie systems, the public necessity for which has in my opinion been amply proved, and partly at the construction of a new electric railroad from Hinman to the Niagara Frontier — the value of which latter project, to the

public seems at the present time to be somewhat problematical. Into these two separate and distinct plans the route of the new railroad which it is proposed to build between Lockport and the Niagara river would, under ordinary circumstances, prove susceptible of perfectly natural subdivision. For the purposes of our present decision, however, it seems that we can not separate the route in this manner — granting a certificate for part of it and refusing one as to the remainder. The application must, as the law now reads, stand or fall in its entirety in the form in which it has been presented to us by those who propose to invest their money in the new enterprise. I entirely agree with my colleagues upon that point.

In order to dispose of the present case justly, therefore, we must decide whether, in our opinion, the public interest would be better served by a rejection of the entire application because the necessity of the Hinman-Niagara river extension has not been proved, or by an approval of the entire application because a public need for the connection at Hinman between the Buffalo, Lockport and Rochester railroad and the Erie and International systems has been shown. The fact that the law requires us to treat the plan which has been laid before us as an entirety does not mean, as I understand it, that we must of necessity deny the entire application because we think that it is in part superfluous, or even undesirable. We have a perfect right, I take it, to decide that the entire application shall be granted if those features of it which have been shown to be greatly in the public interest strike us, on the whole, as outweighing in importance the features which have not been supported by proof of public necessity.

Feeling, as I do, that the connection at Hinman between the Buffalo, Lockport and Rochester railroad and the Erie and International systems, which the present plan provides for, is, within a proper meaning of the term, a "necessity" from the standpoint of the public, and that the extension

from Hinman to the Niagara river, while not exactly necessary at present, might at least prove to be a convenience to the public without seriously injuring anyone, I have come to the conclusion that the reasons for granting this application in its entirety are stronger, on the whole, than any reasons which have been or can be advanced for its rejection.

That The New York Central Railroad Company, which at present serves the neighborhood between Lockport and the Niagara Frontier, would be entitled to protection at the hands of this Commission if the competition threatened by this new line seemed to the Commission to be of a kind which might prove ultimately ruinous to both competitors, and therefore injurious to the public itself, I am well aware. I should doubtless consider it my duty to vote against the present application, notwithstanding the desirable features of it to which I have already made reference, if I really thought that the granting of it meant that some material injury would fall upon the great transportation system which now, through one of its branch lines, serves the region between Lockport and Niagara Falls. Anything which seriously threatens to impair the present efficiency of a railroad like the New York Central, upon which vast populations are absolutely dependent, must under existing conditions be regarded not merely as dangerous to the owners of the property in question, but as a menace to the public at large. I can not think, however, that The New York Central Railroad Company would be materially injured by our permitting about fourteen miles of new track to be built by a competing company between Hinman and the Niagara river. It was not, as I understand it, the purpose of the framers of the Public Service Commissions Law to forbid competition under any and all circumstances between public utilities operating in a single field. The intention, rather, was that competition should be discouraged only in cases where, in the judgment of the Commission, it threatened to become so wasteful and injurious to both competitors as ultimately to affect the

ability of either, or both, to give the public decent service. If this new road were to be built, I think the public would be almost certain to get better service from the New York Central and Niagara River and Eastern railroads, jointly, than it now receives from the New York Central alone.

Whether, if this application should be granted, the Niagara River and Eastern project would turn out to be a very profitable venture for its promoters, is of course another question entirely, and one upon which I am not prepared at this time to express any definite opinion. I do not understand it to be necessary, in order to justify the issuance of a certificate of public convenience and a necessity in a case like this, that we should first conclude that the applying company is assured, beyond peradventure, of a prosperous financial future. Whether or not the new road, if built, would be able to conduct a lucrative business between the Niagara river and Lockport, I am convinced at any rate that the result of the experiment would not be to injure the road which now serves this neighborhood enough to warrant our withholding from the people of Western New York whatever benefits may attach to the possession of an electric line from Lockport to the Frontier, in addition to the steam transportation facilities which they already enjoy.

I think that the present application should be granted, rather than denied, for the reasons I have mentioned; and therefore I dissent from the conclusions to which a majority of my colleagues have come.

In the Matter of the Complaint of the TOWN OF BRANT, CHARLES NORDBLOOM, and BEMUS PIERCE *against* IROQUOIS NATURAL GAS COMPANY, SOUTH SHORE NATURAL GAS AND FUEL COMPANY, UNITED NATURAL GAS COMPANY, FINANCE OIL COMPANY, and RESERVATION GAS COMPANY. [Case No. 5393.]

A natural gas company, which obtains its product from wells and carries the same through service pipes into a high pressure transmission line, should not be restrained by the Public Service Commission from installing and operating a mechanical device, known as a compressor, to accelerate the flow of gas through the service pipes, and thus increase the pressure to that existing in the transmission line.

On a complaint by landowners, who have leased property for drilling and gas producing purposes, against the lessees, for using a compressor which, according to the complaint, unlawfully and unreasonably increases the flow of gas from the wells, resulting in great prejudice and loss to the complainants, and asking the Commission to restrain the companies from operating such contrivance, the Commission holds that such matters relate to the private rights of the parties and do not concern the interests of the public; and, therefore, the Commission is without jurisdiction to grant the relief demanded.

Complaint dismissed.

Decided October 17, 1916.

Appearances:

LeRoy Andrus, Mutual Life Building, Buffalo, attorney for the complainants.

Kenefick, Cooke, Mitchell and Bass, Marine Bank Building, Buffalo, attorneys for Iroquois Natural Gas Company and United Natural Gas Company.

Williams, Minard and Howell, Erie County Bank Building, Buffalo, attorneys for South Shore Natural Gas and Fuel Company.

George W. Cole, Salamanca, and *Thomas L. Newton*, Fidelity Building, Buffalo, attorneys for the Finance Oil Company and Reservation Gas Company.

HODSON, Commissioner:

The Town of Brant, Erie county, together with some of its property owners, filed their complaint with the Commission against the Iroquois Natural Gas Company, South Shore Natural Gas and Fuel Company, United Natural Gas Company, Finance Oil Company, and the Reservation Gas Company. The complaint shows that these companies, either singly or together, are engaged in the business of drilling for, selling, producing, and disposing of natural gas in the town of Brant, and elsewhere, and particularly within the boundaries of the Cattaraugus Indian Reservation which is partly within the said town.

The theory of the complainants seems to be that the several respondents, or some of them, are violating the Public Service Commissions Law, and that this Commission should intervene to prevent such unlawful practices. The complaint is very general, and upon information and belief, that certain farmers leased their lands to one of such gas companies for the purpose of drilling for gas; that either such leases or the gas produced from the wells were sold to another company, and that one of those companies, or still another, which operates distribution and transmission lines, employs compressors and pumps to accelerate the gas through such lines, thus tending to deplete the supply, and depriving the landowners of their rights and privileges in and to said natural gas and the proper use and enjoyment thereof. A specific complaint is directed against the Iroquois and South Shore companies, which take the gas from several wells in that territory and send it through their transmission lines to Buffalo and other distant points, using pumps and compressors for such purpose, which, according to the allegations of the complaint, unlawfully and unreasonably increases the flow of gas from the wells in said town, resulting in great prejudice, disadvantage, and loss to the complainants. The Commission is asked to enjoin and restrain the respondents from operating such contrivances, so that the natural gas in

and upon the premises of the complainants may be protected from unreasonable impairment, and their rights thereto may be preserved.

It is quite apparent that at the time this complaint was filed, the complainants were without specific information as to which of the respondent companies worked the gas wells, transported the gas, or operated the compressors along the pipe lines. The answers of the companies have clarified the situation somewhat, and at the hearing held by the Commission in this case, it appeared conclusively that none of the companies has installed or used any pumps, and that the Reservation Gas Company alone has installed a compressor, although the South Shore Natural Gas and Fuel Company has made preparations for such installation, as a precautionary measure, in case there should be a serious drop in the pressure of gas at any point in its system. It also satisfactorily appears from the answers of the respondents, and from the proof in the case, that the Finance Oil Company and the Reservation Gas Company operate certain gas wells in the town of Brant, and sell their product to the Iroquois Natural Gas Company, delivering the same through service pipes into the high pressure transmission line of the latter company, whereby it is conveyed to the city of Buffalo and other places and there sold and delivered to consumers. The pressure of the gas as it comes from such wells, and passes through such service pipes, is far below the pressure maintained in said transmission line, and it, therefore, becomes necessary to use this mechanical device, called a compressor, in order to maintain a pressure in the service pipes equal to the line pressure of the Iroquois company's transmission. To meet this necessity, the Reservation Gas Company has, for some time, operated a compressor at a point on its service line far removed from the wells, which takes up the gas as it comes from the wells, and sends it on to such transmission line at an increased pressure. No pump is employed in this operation, and no compressor is used at any well; and

the respondents maintain that the flow of gas from the wells is neither increased nor diminished by the use of the compressor.

There is substantial agreement between the parties as to these facts, except that it is contended by the complainants that the operation of the compressor is in the nature of a pump, which creates vacuums at the wells, and, by suction, takes more gas therefrom than would flow in a natural way. This claim is not supported by any proof. Opposed to this is the theory advanced by the respondents, that the office of such compressor is merely to take up the gas and accelerate its flow through the pipes, and does not increase the volume of gas as it comes from the wells; this theory is fortified by the long experience of the companies as large producers and distributors of natural gas, and if their conclusion is correct, then it follows that such device is in no sense unlawful or unreasonable, and the respondents should not be restrained in its use.

But the respondents in this case raise a jurisdictional question by making the further point that the claims of the complainants relate to the fundamental property rights of the parties, and are not directed to the service or practices of the respondents as public utilities. There is great force in this argument, when it is considered that all the gas obtained from the wells in the town of Brant is produced under and pursuant to written contracts between the land-owners and the companies. These contracts provide that the companies may go upon the land and drill for and obtain natural gas for commercial purposes; and it goes without saying that distribution and transmission lines must be maintained for the purpose of conveying the gas to a profitable market. All the rights and interests of both parties are or should be defined in such contracts, particularly in relation to the production and disposition of the gas, the amount thereof, and the compensation to be received by the land-owner. If these things are not provided for, and either

party is desirous of construing or re-forming the agreement, or enforcing the same by injunction or otherwise, the place for such action is a court of equity and not the Public Service Commission.

It will be borne in mind that the complaint herein is not directed to any of the subjects which are mentioned in section 66 of the Public Service Commissions Law, which constitute the sum total of the Commission's jurisdiction in this class of cases. True, we have general supervision of gas corporations, and may investigate their franchises, practices, rates, and service; we may also prescribe extensions and improvements for a gas plant, where public health, good service, or protection of gas users require the same; and this means that the Commission is charged with the duty of ascertaining and determining whether the equipment and appliances of a gas company are safe, efficient and adequate for the security and accommodation of the public, and in compliance with its charter and franchises and the provisions of law, and to remedy any defects which may be found; but nowhere in the law can be found any provision that delegates to this Commission power to supervise the contracts referred to, and determine the individual rights of the parties thereto. The authority of the Commission is confined to the operations of the gas companies as public utilities, and has no concern with the private controversies which they may have with others. It will not be seriously contended that this Commission would have the authority to put a gas company in possession of a producing well, even after being wrongfully excluded therefrom by the landowner; no more have we the right to say that gas shall be taken from the well only in certain quantities or at certain times. Such matters relate to the private property rights of the parties, which must not be confounded with the interests of the public.

The Supreme Court is the tribunal where the conflicting claims of the parties may be determined. After that, and when the company seeks to distribute its gas to the public,

this Commission is empowered to regulate and control the practices and service of the company, in the manner and to the extent prescribed by section 66 of the Public Service Commissions Law.

Nothing more need be said upon the questions involved in this case, for it has been made clear that the Commission has no jurisdiction to grant the relief sought by the complainants herein, and an order should be entered dismissing the complaint.

All concur.

PETITION OF TOWN BOARD AND TOWN SUPERINTENDENT OF HIGHWAYS, TOWN OF BARTON, Tioga county, under section 90 of the Railroad Law for a determination of how a new highway shall cross the railroad of The Lehigh Valley Rail Way Company (leased to and operated by the Lehigh Valley Railroad Company). [Case No. 5507.]

Where a new highway is constructed across a steam surface railroad (except where such highway is a part of a state or county highway constructed or improved as provided in the Highway Law—in which case rules different from those hereinafter enunciated obtain), the expense of such new highway construction is apportioned by statute as follows:

a. When such new highway is constructed as an essential part of a plan to eliminate the crossing at grade of one or more existing highways, the entire expense of construction of both the highway and the crossing and the approaches thereto, whether such crossing shall be at, over, or under grade, shall be shared between the railroad corporation, which is to pay one-half, and the municipal corporation and the State, which are respectively to pay one-quarter of such cost; except that where the new crossing is at grade, the cost of installing and maintaining any incidental safeguards prescribed by the Commission is to be borne alone by the railroad corporation.

b. When such new highway is not part of a plan for the elimination of an existing highway grade crossing, if it is determined that the crossing shall be over or under grade, the expense of making such crossing shall be borne equally by the railroad corporation and by the municipal corporation having jurisdiction over the highway. But if it is determined that such crossing shall be at grade, no part of the expense of making the same is chargeable to the railroad corporation except the planking at the outside of and between the rails required by section 21 of the Railroad Law, and the installation and maintenance of any incidental safeguards which may be prescribed by the Commission under section 90 of the Railroad Law.

Held that while the cost of necessary approaches to an overgrade crossing of a steam surface railroad by a new highway must be taken into consideration in determining the amount which is to be apportioned between the railroad corporation and the municipal corporation under sections 90 and 94 of the Railroad Law, only so much of the cost of

such approaches as is represented by actual expenditure in excess of that which necessarily would have been incurred if the crossing had been at grade is to be included in the account.

Decided November 9, 1916.

VAN SANTVOORD, *Chairman*:

This is an application of the Town Board and Town Superintendent of Highways of the Town of Barton, under section 90 of the Railroad Law, for a determination of how a new highway shall cross the railroad of The Lehigh Valley Rail Way Company. The facts are undisputed, and the Commission's proposed determination of the method by which the new highway crossing shall be effected is uncontested; but there has arisen a question in regard to the proper distribution of the expense of making the crossing. Ordinarily such questions are relegated to the final accounting which follows the completed work. This Commission, however, has encouraged disposition of such issues at the time of determining the main question, or at least at the earliest possible stage of the proceeding, which thereafter goes forward under plans adopted with full knowledge by the parties of their respective shares of the cost of construction, for which latter adequate and seasonable provision is thus enabled.

That part of section 90 of the Railroad Law which is germane to this proceeding is as follows:

When a new highway shall hereafter be constructed across a steam surface railroad, such highway shall pass over or under such railroad or at grade as the public service commission shall direct. If the commission determine that such highway shall be carried across such railroad above grade, then said commission shall determine the height, the length and the material of the bridge or structure by means of which such highway shall be carried across such railroad, and the length, character and grades of the approaches thereto. If said commission shall determine that such highway shall be constructed or extended below the grade, said commission shall determine the manner and method in which the same shall be so carried under and the grade or

grades thereof, and if said commission shall determine that said highway shall be constructed or extended at grade, said commission shall determine the manner and method in which the same shall be carried over said railroad at grade and what safeguards shall be maintained.

That part of section 94 of the Railroad Law as amended by chapter 240 of the laws of 1915 which is germane to the question of cost apportionment herein, reads as follows:

Whenever under the provisions of section 90 of this chapter a new highway is constructed across an existing railroad, the railroad corporation shall pay one-half and the municipal corporation having jurisdiction over such highway shall pay the remaining one-half of the expense of making such crossing above or below the grade of the railroad.

The proposed new highway begins at the easterly line of the incorporated village of Waverly and extends in an easterly direction to intersect an existing road known as the Talmage Hill Road, which runs north and south. The route of the proposed highway is crossed in a northerly and southerly direction by Cayuta creek and by the Lehigh Valley railway respectively. From the point of beginning, in the east boundary of the village, to the west bank of the creek is a distance of about nineteen feet; from the west bank of the creek to its east bank (measured along the route of the new highway) is about two hundred and twenty feet; from the east bank of the creek to the west line of the railroad right of way is about one hundred and eleven feet. Thus the entire distance from the beginning of the new highway to the railroad right of way is approximately three hundred and fifty feet, while the railroad right of way is one hundred and ten feet wide at the proposed crossing. The width of the creek as above mentioned is measured across a low island which divides the stream into two branches directly within the route of the proposed highway.

It thus appears that construction of the highway necessarily involves bridging Cayuta creek: and this without regard to the method of crossing the railroad, whether above, below, or at grade. If it were feasible and considered advis-

able that the highway should cross beneath the railroad, the point of beginning of the descent to the under-pass would necessarily be at or to the east of the east abutment of the structure spanning the creek; in which case, the bridge being entirely unrelated to either the under-crossing or the approach thereto, it is manifest that the cost of said structure could not possibly be considered as part of the "expense of making such crossing below the grade of the railroad". Under existing conditions, however, it is conceded by all the parties, and this Commission is prepared to determine, that properly the new highway should be carried over the railroad. The plan before us provides for an overhead structure with a clearance of twenty-two feet above rails, and this Commission has repeatedly expressed its disapproval of any substantially lesser clearance. (*Petition of The Long Island Railroad Company under section 91 of the Railroad Law as to changing the Duck Pond Road highway grade crossing of its railroad in the town of Oyster Bay, Nassau county, to an overhead crossing*, P. S. C., 2 N. Y., Case No. 1848.) It has already been stated that the distance from the east bank of the creek to the railroad right of way is only one hundred and eleven feet; so that to provide an approach to the proposed overhead structure at what is regarded as a proper grade (not to exceed 6 per cent) necessarily involves commencing the graded approach at some point west of the creek. As matter of fact, under the plans submitted — which it may be observed have received general approval — the graded approach to the over-crossing on the east begins at or very near the corporate line: there being a fill on a 6 per cent grade as far as the west bank of the creek, the bridge over which is at a 4 per cent grade, and the fill between the east abutment of the bridge and the over-crossing proper being at a 6 per cent grade. The village accordingly claims that since the bridge over the creek with the incidental fill is an integral part of the approach to the over-crossing, the entire cost of such bridge and fill must be considered

as part of the "expense of making such crossing above the grade of the railroad". (Section 94 of the Railroad Law, above quoted.) We are clearly of opinion that this contention of the petitioner can not be sustained. The mere bridging of Cayuta creek as a part of the proposed highway is not in the slightest degree occasioned by the presence of the railroad tracks, which are to be crossed only after the highway has projected itself to the point of intersection with the railroad right of way east of the creek. The statutory imposition upon the railroad of sharing with the municipality the expense of an over- or undergrade crossing of a new highway was surely never intended to burden the railroad company with any part of the cost of such highway construction, for which the existence of the railroad is neither directly nor indirectly responsible. Suppose, because of infrequent train operation at the point of crossing, unobstructed view of the track from either direction, and considerations of economy, it were proposed and determined by the Commission that the crossing should be at grade; at whose expense would the bridge over the creek be constructed? Why, necessarily at that of the applicant municipality, because the provision in regard to apportioning the expense of constructing a new highway across a railroad is expressly limited to the case of such a crossing either above or below grade. Apparently, in imposing upon the railroad company part of the cost of such new enterprise constructed at the instance and for the use of the public — not of the railroad — the Legislature proceeded upon the theory that where in a proper case conditions of safety require the construction of an over- or undercrossing, the railroad corporation properly should share the cost, because the expenditure is actually occasioned by the fact of the existence and operation of the railroad. But where such new highway is constructed across a railroad at grade, no part of the expense of making such crossing is imposed upon the railroad company, presumably for the reason that under the ordinary circumstances of such a cross-

ing the proximity of the railroad right of way will not occasion any extraordinary expenditure in the construction of the highway. It is true that if at the point of crossing the grade of the railroad had been artificially raised above the unimproved grade of the land traversed by the new highway, construction of the latter would involve such fill as would be necessary to make a properly graded approach to the railroad right of way on each side of the crossing, which fill would be unnecessary if the railroad embankment did not exist: and under such circumstances it might be urged that in the apportionment of expense fixed by section 94 of the Railroad Law, above quoted, the differentiation between over- and undergrade crossings on the one hand, and crossings at grade on the other, is illogical. Possibly it was otherwise regarded by the Legislature for the reason, first, that in any event the expense of such a fill would be comparatively small; and second, that it would probably at least be equalized by the incidental burden upon the railroad of the cost of installing and maintaining the safeguards—such as gates, sign-boards, attendance of a flagman, etc.—which might be prescribed by this Commission either under the last clause of that portion of section 90 of the Railroad Law above quoted, or in a separate proceeding under section 53 of the Railroad Law. But however this may be, in apportioning the expense of a highway crossing in a proceeding like that now before us, the statute plainly has established a clear distinction between the case of making such a crossing over or under the grade of the railroad and the cost of making the crossing at grade. And it is interesting to notice that recently the Legislature seems to itself have recognized the propriety of imposing upon the railroad corporation some part of the expense of a highway crossing of its tracks at grade in an amendment to section 21 of the Railroad Law, whereby in all cases where a railroad crosses a highway at grade the corporation owning or operating such railroad shall construct and maintain a roadway at least sixteen feet

wide, to be made of planking or equally serviceable material, which shall extend at least one foot outside of the outside rails, through and across the entire space between the rails at such crossing. (Laws of 1916, Chap. 109.)

But the ethics of the statutory provision for apportionment of the expense of new highway construction as applied in the case of a grade crossing of a railroad under the conditions above suggested (where the roadbed has been constructed upon an artificial embankment), properly has no place in construction of the statute, and is of interest in this discussion only by way of illustration, for the reason that the profile on the map which has been introduced in evidence clearly indicates that in this case there is no such relation between the grade of the railroad right of way at the point of the proposed highway crossing and the grade of the adjacent land which is to be traversed by the highway as would require any unusual fill to constitute an approach to the right of way if the crossing should be made at grade.

It must be observed that the foregoing discussion of the distribution of expense of carrying a new highway over a railroad is limited to the circumstances of a case which arises under section 90 of the Railroad Law. Where a new highway is constructed as an essential part of a plan to eliminate the crossing at grade of one or more existing highways a different rule obtains. In such a case *all* of the cost of the new construction is imposed upon the railroad corporation, which is to pay one-half, and the municipal corporation and the State, which are each to pay one-quarter of such cost. This would cover the conceivable cost of elimination of several contiguous highway crossings at grade by diverting traffic from such highway or highways respectively to a new highway also crossing the railroad at grade. "Whenever a *change* is made as to the existing crossing," etc., "the expense *thereof*," is the language of the statute. (Subdivision 3, sec. 94 of the Railroad Law.) It is also to be noted particularly that the discussion does not apply in the case of

a new highway which is a part of a state or county highway constructed or improved as provided in the Highway Law — in which event rules governing the distribution of expense different from those above enunciated obtain. Such rules will be found in subdivision 4 of section 94 of the Railroad Law, to be read in connection with sections 90 and 91 of said law.

From the foregoing we think it should be considered very clear that the cost of construction of so much of the bridge over Cayuta creek, and the incidental fill both to the east and west of the stream and on the island between the two branches as would be necessary to bring the new highway to the railroad right of way if the latter were to be crossed at grade, must be borne and paid for alone by the petitioning municipality; but that the cost of such additional fill and of such elevation of the bridge structure as are necessary by reason of the graded approach to the overhead crossing proper as shown by the map filed herein, must be deemed a part of the expense of making the crossing above the grade of the railroad and charged against the parties equally. Such differentiation of cost should be an easy problem in engineering accounting: it may now be approximately arrived at for the immediate purposes of the petitioner in making its final arrangements for the undertaking and precisely determined as a part of the final adjustment.

An order should be entered accordingly.

All concur.

In the Matter of the Petition of THE NEW YORK CENTRAL RAILROAD COMPANY for the elimination of what is known as the Floyd Road grade crossing of the tracks of the Utica and Black River Railroad north of Marcy station. [Case No. 2891.]

1. Where under a proposed plan for eliminating the crossing at grade of a railroad by a public highway the danger of collision with trains at such crossing would be superseded by serious danger of vehicular collision incidental to the new construction, the project should not be approved by the Public Service Commission.

2. In the elimination of a railroad crossing at grade by a country road of limited use through diversion of traffic over a new road to connect at an acute angle with an improved and largely used highway at a point where the latter emerges from a railroad under-crossing, the danger of vehicular collision at the intersecting point which would arise because of impaired view occasioned by the railroad embankment outweighs the dangers of the present grade crossing.

3. Propriety of extending the powers of the Public Service Commission to include amelioration of dangerous conditions at grade crossings, discussed.

Decided November 8, 1916.

VAN SANTVOORD, *Chairman*:

This is an application of The New York Central Railroad Company for the elimination of a grade crossing by a highway known as the Floyd Road, of the tracks of the Utica and Black River railroad (leased to The New York Central Railroad Company), about three miles north of the Marcy station.

The Floyd Road, running substantially north and south, crosses the two tracks of the railroad practically at right-angles, and intersects the so called Robbins Road at a point distant about six hundred feet south of the railroad. The Robbins road is an improved state highway. From the last mentioned intersection it extends in a northeasterly direction and crosses under the grade of the railroad at a point about nine hundred and thirty feet east of the Floyd Road crossing.

At the southwest angle of the Floyd Road crossing there is a piece of standing timber with more or less underbrush, which by consequent impairment of view materially increases the danger of the crossing when approached from the south.

It is proposed by the petitioner to close the Floyd Road crossing and build a new highway north of the railroad to connect the Floyd Road with the Robbins Road, the new highway to be parallel with the railroad and distant therefrom about eighty feet, and the point of intersection with the Robbins Road to be about one thousand and forty feet east of the Floyd Road. Traffic over the Floyd Road from the north would thus be diverted to connect with the improved highway at a point north of the railroad, and thence by the under-pass if bound south — with a reverse in the case of northbound traffic over the Floyd Road. But the intersection of the proposed new road and the Robbins Road is at a very acute angle; and because of the railroad embankment, drivers of vehicles approaching the under-pass on the Robbins road from the south could not see approaching vehicles on the proposed new road until almost at the point of intersection, and *vice versa*. The Robbins Road being an improved highway is naturally used quite extensively by automobiles, while the use of the Floyd Road is much more limited. In our opinion, the incidental danger of horse-drawn vehicles being in collision with motor vehicles at the intersection of the proposed new road just north of the under-pass is so great as to more than counterbalance the danger element involved in the present grade crossing. We are led to this conclusion by a careful personal inspection of both the locality and the local traffic which moves at the points involved. Our conclusion would be unreserved but for the obstruction of view in approaching the Floyd crossing from the south, occasioned by the woods standing in the southwest angle. We regard it as unfortunate that the authority of the Commission to order the elimination of grade crossings does not include power in a proper case

to ameliorate the danger of such crossing by compelling the removal of physical obstructions to a free view of the approach from either direction — the costs of condemnation of land, the acquisition of a necessary easement or consequential damages to be apportioned between the parties in the existing statutory ratio. This observation has not been occasioned alone by the facts in this case; the conviction has long been forming in the mind of the writer. I am of opinion that the Legislature properly may be memorialized on the subject by this Commission.

The application should be denied.

All concur.

In the Matter of the Complaint of the NORTHERN ADIRONDACK POWER COMPANY *against* J. & J. ROGERS COMPANY as to alleged unlawful operation of an electric plant. [Case No. 5080.]

In the Matter of the Joint Petition of J. & J. ROGERS COMPANY and AUSABLE ELECTRIC LIGHT AND POWER COMPANY under section 70, Public Service Commissions Law, for consent to the transfer by sale of franchise, works, and system of an electric plant in the town of Jay, Essex county, from the first named company to the second named company; and under section 68 as to exercise of the franchise by the Ausable Company. [Case No. 5692.]

Section 36 of the General Corporation Law, providing that if corporations, with certain exceptions, shall not organize and commence the transaction of their business or undertake the discharge of their corporate duties within two years from the date of incorporation their corporate powers shall cease, is self executing. If such a corporation does not organize and commence the transaction of its business or undertake the discharge of its corporate duties within the time fixed by the statute, it becomes incapable of purchasing, receiving, or holding any property or franchises.

Decided November 16, 1916.

Appearances:

Charles J. Vert, 42 Clinton street, Plattsburgh, N. Y., as attorney for J. & J. Rogers Company and Ausable Electric Light and Power Company.

Thomas F. O'Connor, Waterford, Saratoga county, N. Y., as attorney for Northern Adirondack Power Company.

IRVINE, Commissioner:

In the first of these cases the Northern Adirondack Power Company asserts that the J. & J. Rogers Company is unlawfully carrying on the business of an electrical corporation in that part of the unincorporated village of Ausable Forks

which lies in the town of Jay in Essex county, and asks that this Commission "take such action in the premises as may be just and equitable". In the second case the J. & J. Rogers Company and the Ausable Electric Light and Power Company ask the approval of a proposed transfer of a franchise claimed by the Rogers Company to operate in the town of Jay. Concurrently with the filing of the first complaint, the Northern Adirondack Power Company applied to the Attorney-General for action against the J. & J. Rogers Company on grounds similar to those upon which this complaint is based. This case was held awaiting the action of the Attorney-General in the premises, and after such action the two cases were heard together upon certain preliminary questions of law to be hereinafter stated. The J. & J. Rogers Company is primarily engaged in the manufacture of pulp and paper at Ausable Forks. Many years ago it drifted into the business of supplying the village with electricity in a manner described by this Commission *In the Matter of the Application of The Paul Smith's Electric Light and Power and Railroad Company* (IV P. S. C., 2nd D., 370). In 1911 this Commission granted the Keeseville Electric Company, predecessor of the Northern Adirondack Power Company, permission to erect and maintain poles and wires in the town of Jay, and approving a franchise therefor. In 1914 permission was asked for the transfer by the Rogers Company to The Paul Smith's Electric Light and Power and Railroad Company of the franchise, works, and system of the Rogers Company's electric plant. This was denied in the opinion above cited, but it seems that the Rogers Company has continued to supply electricity in that part of the village of Ausable Forks lying in the town of Jay.

It appeared on the application to the Attorney-General that the J. & J. Rogers Company is incorporated under the General Corporation Law and not under the Transportation Corporations Law. He accordingly held that in distributing and selling electric current the Rogers Company was acting

ultra vires, and directed that unless it should cease its electric business within a time fixed and present the Attorney-General satisfactory proof that it had so done an action would be brought to vacate the charter and annul the corporate existence of the Rogers Company. The joint application of the Rogers Company and of the Ausable Company is evidently made in an effort to comply with the direction of the Attorney-General.

The Ausable Company was incorporated April 6, 1901, and to quote the petition, "said corporation has never done any business, nor has any stock been issued, nor has it incurred any indebtedness. By-laws were adopted, and the company organized, but nothing further was done. There is really no detailed statement to be given under Rule 19, for the reason that, as stated above, no stock has been issued, no property purchased, no business done, no liabilities incurred; the authorized capital stock being \$25,000".

Section 36 of the General Corporation Law provides "If any corporation, except a railroad, turnpike, plank-road or bridge corporation, shall not organize and commence the transaction of its business or undertake the discharge of its corporate duties within two years from the date of its incorporation, its corporate powers shall cease". It is admitted that the Ausable Company did not commence the transaction of any business or undertake the discharge of its corporate duties within two years from the date of its incorporation, and that in fact it has never done either of these things. It is therefore non-existent as a corporation and incapable of taking over any franchise or property if, by virtue of this statute, its corporate powers ceased *ipso facto*. The argument is that the presumption is against such a construction of the law, and that unless such construction is clearly impelled by the language of the statute, corporate powers do not cease until a forfeiture has been judicially determined in a direct proceeding for that purpose by the Attorney-General. It is contended that the language used in this

statute does not clearly render it self executing, and some decisions from other jurisdictions are cited in support of that view. We are, however, foreclosed from the consideration of these by the decisions of our own courts. In *People v. Stilwell*, 157 App. Div. 839, this very section was under consideration, and the Appellate Division of the First Department unanimously held that its provisions are self executing and that no action or judicial procedure is needed to declare or complete the loss of corporate powers at the end of the period.

Section 12 of the Railroad Law provides "If any domestic corporation shall not, within five years after its certificate of incorporation is filed, begin the construction of its road and expend thereon ten per centum of the amount of its capital, or shall not finish its road and put it in operation within ten years from the time of filing such certificate, its corporate existence and powers shall cease". It will be observed that the only difference in language is that in the Railroad Law it is provided that the corporate existence as well as corporate powers shall cease. The Court of Appeals held that this provision is self executing *In the Matter of Brooklyn, W. & N. Ry Co.*, 72 N. Y. 245. This construction was reaffirmed *In the Matter of Brooklyn, Q. Co. and Suburban R. R. Co.*, 185 N. Y. 171. Even if the difference in language is such as to lead to the conclusion that while a railroad corporation loses both its corporate existence and its corporate powers by non-user within the statutory time, another corporation retains its corporate existence and loses only its corporate powers, the result in this case is the same. If the Ausable Forks Company has no corporate power, it can not purchase, receive, or hold any property or franchises.

It follows that the application in the second case must be denied for the reasons stated, and it becomes unnecessary to decide the other interesting legal question presented as to whether the Rogers Company, having no authority to engage in the business of distributing and selling electric current,

could receive or hold a franchise for that purpose which could be made the subject of transfer.

As to the first application, the request is "for such action in the premises as may be just and equitable". It would seem that the proper action would be to direct counsel for the Commission to begin proceedings under section 74 to restrain the Rogers Company from transacting the electric business unlawfully. As the Attorney-General has expressed his intention of proceeding on behalf of the State if the unlawful operation is not abandoned, the Commission does not feel warranted at this time in directing another action for the same purpose.

All concur.

In the Matter of the Application of the TROY AUTO CAR COMPANY, INC., for a Certificate to Operate a Bus Line in the City of Troy, Rensselaer county, N. Y. [Case No. 5095.]

1. The municipal consent to the operation of stage lines within a city required by chapter 667 of the laws of 1915 is not a franchise in the sense of section 37 of the Second Class Cities Law, requiring that franchises must be disposed of at public auction.

2. The phrase "public convenience and necessity" as used in chapter 667 of the laws of 1915 is to be taken as an entirety. It is not necessary, as a precedent to the granting of a certificate, that the Commission should find that the proposed stage line is strictly a necessity as well as a convenience. Public convenience and necessity exists when the proposed facility will meet a reasonable want of the public and supply a need, if existing facilities, while in a sense sufficient, do not adequately supply that need.

3. Under the facts set forth in the opinion, a certificate of public convenience and necessity was granted to a stage route about three and one-half miles in length, although for ten thousand feet it is one block from and parallel to an existing street railroad line, and through the remainder of its distance less than one thousand feet therefrom. (Carr, dissenting.)

Decided November 23, 1916.

Appearances:

Crawford & Cogan (by Henry J. Crawford and W. H. Cogan), 128 State street, Albany, N. Y., attorneys for applicant.

Lewis E. Carr, John E. MacLean, and T. K. Wellington, Albany, N. Y., for United Traction Company in opposition.

W. B. Fitzgerald, 358 4th street, Troy, N. Y., member of the General Executive Board of the Street Railway Employees; *Joseph F. McLaughlin*, president of the local union of Troy; and *Joseph S. Droogan*, president of the local union of Albany, in opposition to the granting of the certificate applied for.

IRVINE, Commissioner:

The Troy Auto Car Company, Inc., seeks a certificate of convenience and necessity under chapter 667 of the laws of 1915 for the operation of a stage route by motor vehicles in the city of Troy. The application is resisted by the United Traction Company, operating a system of street railways in the same city.

Certain individuals, apparently as copartners, commenced the operation of auto busses on the route involved and hereinafter described shortly prior to the enactment of the law of 1915. After the enactment of that law the Troy Auto Car Company was incorporated by these individuals, and consent of the City of Troy was obtained to the operation of the line. Application was made to the Public Service Commission for a certificate of convenience and necessity, but on the hearing it developed that the incorporation was under the Business Corporations Law and not under the Transportation Corporations Law. The application was therefore withdrawn, and the company was reincorporated under the Transportation Corporations Law and the application renewed. The original consent of the City of Troy was for a period of one year, and the original and amended applications were based on this consent. By later ordinance this consent has been extended for a further period of five years. Technically, perhaps, a new petition should have been presented for a certificate based upon the later ordinance, but a hearing has been held since its enactment and the expiration of the original consent, the new ordinance was offered in evidence, and no substantial right is impaired by treating the pending application as if it were based on the new ordinance which in nowise by its nature affects the disposition of the case upon its merits.

The city of Troy extends for several miles north and south on the east side of the Hudson river. Its growth to the eastward is impeded by hills so that the width of the densely built portion from west to east is comparatively small.

Indeed, its shape was characterized by witnesses at the hearing as resembling a shoestring. The stage route commences almost at the northern end of the city, extends along Fifth avenue in "Upper Troy" which becomes Sixth avenue farther south; then, avoiding a very slight eminence known as Mount Olympus, goes west to Fifth avenue in the main part of the city and extends to Congress street in the business center; looping around four blocks, it returns to Fifth avenue, and by the same route to the point of beginning. The United Traction Company has for many years maintained and now maintains a line of street railway beginning in Waterford, crossing the Hudson river and reaching Second avenue in "Upper Troy" at 26th street, one block north of the terminus of the stage line. The street car line extends down Second avenue and River street, reaching and passing the business center. The maps in evidence show that the stage route is something more than three miles in length measuring from 25th street, its northern terminus, to the loop. From this loop north to Second street, a distance of about ten thousand feet, the routes of the stages and the street cars are substantially one block apart. The distance ranges from 244 feet to 354 feet. From Second street north to Eighth street, a distance of about 3200 feet, the routes diverge. From Eighth street north about 7200 feet they are from 944 to 952 feet apart. The operation of the stage line is by means of four large auto busses operating on a headway of fifteen minutes. The United Traction Company operates over a portion of its route in the competitive district thirty-four cars an hour, and over the northern part of the line thirteen cars an hour. In rush hours this service is somewhat increased. The street railroad line is through the greater part of its distance very near the Hudson river and passengers using it arrive from or are destined to points to the east. The stage line is east of the street car line, and after it diverges north of Second street passes approximately

through about the center of the northern part of the city lying between the river and the hills.

Objection is made to the granting of the proposed certificate upon the ground that the consent of the city was in contravention of section 37 of the Second Class Cities Law, providing that "In case of a proposed sale or lease of real estate or of a franchise the ordinance must provide for a disposition of the same at public auction," etc. We do not think that the municipal consent to the operation of a stage route required by chapter 667 of the laws of 1915 is a franchise within the meaning of the Second Class Cities Law. It involves no permanent structure and no permanent occupation of public property. It involves merely the operation of vehicles over public streets improved and maintained for the purpose of vehicular traffic, an operation that would be entirely lawful without municipal consent except as this statute requires such consent for this particular purpose. It is not a grant of any public right. It disposes of no public property by sale, lease, or otherwise, nor does it surrender or delegate any sovereign or governmental right. It merely permits what, in the absence of restrictive legislation, would be a normal and lawful use of a public highway.

Approaching the merits of the application, it is contended in effect that before the Commission may issue its certificate it must be made to appear that the proposed operation is not only convenient but necessary for public purposes, and that no necessity exists when there is already in the field a carrier prepared to furnish and actually furnishing adequate facilities for transportation. There can be no doubt, when the language and the history of the act of 1915 are considered, that the principal object of the act was to protect street railroad corporations from unjust and ruinous competition by "jitneys". Street railroads require for their operation large capital investments, and the law requires them to pay a large portion of the expense of constructing and maintaining street pavements. Those who embark their

money in such enterprises are entitled to reasonable protection in the public interest. The views of the Commission as to the purpose and construction of the law and the manner in which it is to be administered have been so well stated by Commissioner Emmet *In re Petition of Gray*, decided October 20, 1915, Opinion 231, and *Petition of Ashmead and others*, decided May 16, 1916, Opinion 265, that they need not be here repeated. In applying the principles therein set out to the present case much difficulty is presented. There is no doubt that the operation of the applicant is in direct competition with that of the Traction company throughout the entire route. It can by no means be assumed that every passenger who uses the stage route would use the street cars if a stage route did not operate, but it is safe to assume that in the absence of the stage route a very large majority of its patrons would use the street cars. It would seem, furthermore, that the number of cars operated by the Traction company in the competitive district is sufficient to carry the traffic, and it would seem *a priori* that the street car operation on a headway varying from five minutes to less than two minutes would invite passengers away from automobile transportation on a headway of fifteen minutes, even if a large portion of the passengers should be required to walk a greater distance in order to reach street cars. In spite of this theoretical consideration, the fact confronts us that during fifteen months' operation of the stage route its busses carried 770,852 passengers. This is an absolute demonstration that many people of the neighborhood concerned regard the stage route as a superior convenience. As already stated, throughout the southern part of the routes the stage route and street car line are less than three hundred feet apart, and if that portion alone were involved we would not hesitate to hold that permanent public convenience would better be subserved by compelling a portion of the passengers to walk that much farther and ensure good service on one route rather than to promote a competition by two parallel routes

which might cripple or at least impair the service of each. Evidence at the hearings and inspections made by officers of the Commission show that only about 22 per cent of the applicant's traffic originates or ends in this closely competitive district: 78 per cent consists of passengers boarding or alighting north of Eighth street where the lines are over nine hundred feet apart. Around the extreme northern end of the stage line is a somewhat sparsely settled neighborhood whose residents can reach the street cars only by more or less indirect routes, requiring them to walk a considerably greater distance than the direct distance between the two lines. This neighborhood furnishes about 22 per cent of the total patronage of the stage route.

Summing up the facts, we find that the street car line is at the extreme western edge of the city while the stage line operates approximately through its center and that therefore a great many of the residents can reach the stage line more conveniently than the street car line; that approximately one-fourth of the patrons of the stage line are so situated that access to the street car line is decidedly inconvenient; and that the carrying of over 770,000 passengers in fifteen months demonstrates that a large number of the residents consider the stage line a real convenience. On the other hand, the street railroad furnishes in some respects superior accommodations, and a very large proportion of the 700,000 fares would, in the absence of the stages, have gone into the treasury of the Traction company and to that extent have placed it in better position to serve the public.

Has a public convenience and necessity been established? If the terms be separated and the word "necessity" be given a strict construction, the answer would be that a public convenience had been established but no necessity. We can not, however, adopt the theory of separating the terms and giving to the word "necessity" such a construction. Strictly speaking, the street car line itself is not a public necessity. People walked or rode in horse-drawn vehicles before street cars

were known. They rode in horse cars before electric cars were known. They could do so again if required. Well within the memory of those no older than the writer of this opinion, Broadway in New York was without any means of transportation except by horse-drawn stages. No European city had street cars. Those cities existed and their residents lived and got back and forth. Had the Public Service Commissions Law been in effect when tramways were first exploited, a certificate of convenience and necessity should not have been denied because people could ride in stages. When electric railways were introduced, a certificate should not have been denied because people could ride in horse cars. Certificates would and should have been granted although the result might have been ruinous to the owners of stage routes in the one case and of horse railroads in the other. It was not intended by the law to stop all progress by denying opportunities to new forms of transportation, merely for the purpose of protecting investments made in obsolescent forms. Not that we deem electric street railways obsolescent or auto busses as seriously threatening their existence. We are speaking merely for purposes of illustration. The phrase "convenience and necessity" as used in the law is not to be split in two. If an enterprise is necessary, it is certainly convenient, so that if it be required that a strict necessity be established the word "convenience" would be superfluous. Chief Justice Marshall said, in *McCulloch v. Maryland*, 4 Wheaton 316, "it is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports." So here the word "convenience" is connected with the word "necessity," not as an additional

requirement but to modify what might otherwise be taken as the significance of "necessity". Chief Justice Marshall was considering the phrase "necessary and proper" when he said, "If the word 'necessary' was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning". So here, to analyze the phrase and to attempt to give each word a separate meaning would be an extraordinary departure from the usual course of the human mind as it would prefix a word wholly meaningless when taken in connection with a more rigorous word following. Taking the phrase as an entity it does not mean to require a physical necessity or an indispensable thing. It is dangerous to undertake to formulate abstract definitions in deciding a concrete case, but we take it that for such purposes as are involved in this and similar applications a public convenience and necessity exists when the proposed facility will meet a reasonable want of the public and supply a need, if existing facilities, while in a sense sufficient, do not adequately supply that need. This case is unusually close, but on the whole we are of the opinion that there is such a divergence of the routes and so much greater convenience afforded by the stage route that it may fairly be said that it supplies a want of the public not already adequately met.

VAN SANTVOORD, *Chairman*:

I concur in the prevailing opinion in this case and especially in its consideration of what constitutes "a necessity". Except in respect of a purely basic proposition — such, for example, as "oxygen is necessary for the maintenance of human life" — in its final analysis each question of human necessity resolves itself largely into one of relative convenience. And thus it happens that something which once

may have been generally regarded as a luxury, through extended use and enlarged enjoyment becomes in turn first an unquestioned convenience and finally an acknowledged necessity. Doubtless every one would concede that a bath tub is a convenience; but while most of us would be compelled to admit, if driven into a corner and speaking truthfully, that this well-known adjunct of modern houses is not an absolute necessity, few I think would have the temerity to urge it. Dwelling houses equipped for use of and supplied with illuminating gas may be considered as adequately lighted. And yet in these days of greater things the convenience of electric light is so generally regarded as a necessity that in the case of would-be consumers of electric current (albeit already supplied with gas) sufficient in number to warrant the capital expenditure which would be involved, this Commission would not hesitate to order a lighting company to make the requisite extension of its electric light service, although under the circumstances and from the narrower point of view such supplementary service properly might be considered only an additional convenience instead of an actual necessity.

In the case before us, patrons of the auto bus corporation at the point of the greatest divergence of its route from that of the surface cars, if riding on the latter to and from the center of the city, would be compelled to walk about 950 feet to reach the electric cars and a like distance on their return therefrom. This means an aggregate of nearly two-fifths of a mile of walking over snow-covered sidewalks in Winter and through the rain and heat and dust of other seasons of the year. And, as pointed out by Commissioner Irvine, since many residents of the extreme northern district which will be served by the proposed stage line are able to reach the street cars only by more or less indirect routes, these patrons are compelled to cover a considerably greater distance, going and coming, than that last mentioned. It is further disclosed by the evidence that during fifteen months

of operation approximately six hundred thousand passengers on the stage line (78 per cent of the total number carried during the interval stated) boarded or alighted from the stages north of Eighth street, where the direct distance between the two carriers is more than nine hundred feet. I am unhesitatingly of opinion that under such circumstances the convenience involved in being able to ride to and fro in a public conveyance without being compelled to undergo the extensive foot journeyings above indicated is sufficient to uphold the finding of "a necessity" for a service, the institution and maintenance of which depends only upon approval by this Commission of the exercise of a franchise therefor already deemed proper and granted by the municipality.

While it must be admitted that this case squarely presents the question whether unfair or improper competition with an established carrier is involved, on the whole I am satisfied with Commissioner Irvine's manifest conclusion that the question is not so acute as would justify withholding approval of that which has disclosed itself so obviously as being a public convenience and necessity. The bare fact that exercise of such a franchise will be in competition with an established carrier or will necessarily result in depriving such other carrier of revenue which otherwise it would earn is not sufficient on which to base denial of the application. Otherwise indeed, with comparatively rare exceptions, and as far as any effective result is concerned, the discretionary right of a municipality to grant a franchise of the sort in question would practically be nullified in advance. In my opinion the applicant should be entitled to exercise his franchise (assuming of course that a public convenience and necessity shall have been established), unless the competitive operation thereunder would be manifestly unfair and ruinous to the other carrier; and it has not been established that such result would obtain in this case. We certainly can not base such a conclusion upon the possible withdrawal of certain cars from service by the United Trac-

tion Company on account of decrease resulting from the new competition. Such limited curtailment in car operation would not necessarily or even presumably affect materially the results of operation as a whole.

CARR, *Commissioner*, dissenting:

I am unable to agree in all respects with the opinion of Commissioner Irvine in this case because I feel that an unwarranted hardship is likely to be inflicted upon an existing carrier if we dispose of the case in the manner suggested by him. It is a fact well known by this Commission that some of the lines of the United Traction Company in the city of Troy are unprofitable. If the bus line competition, which now exists in Troy and which it is sought to have this Commission legalize, is continued, it is, I believe, undisputed that the Traction company will be deprived of a substantial revenue which it otherwise would earn by its lines extending to what was formerly known as North Troy and Lansingburgh. Whether the Traction company should be subjected to the loss of this revenue which it undoubtedly needs to maintain proper service in that portion of the city of Troy, and yet be required in the interest of the public to maintain its present service there, is to my mind the controlling question in this case. The stage route now being operated by the petitioner extends from Fifth avenue and Congress street in Troy north to Second street, a distance of approximately two miles, and is substantially one block away from the lines of the Traction company, the distance ranging from 244 to 354 feet; from Second street north to the end of the route, the bus line diverges from the street car lines until they are approximately 950 feet apart. It may probably be fairly assumed that in the territory south of Second street public convenience and necessity do not require the operation of the bus line, and that no proof could be offered which would in any way justify the granting of a certificate of convenience and necessity to it under the situa-

tion as it now exists, having in mind that reasonably adequate street car facilities are provided in that portion of the city of Troy. That being so, we should then consider what the requirements are in that portion of the city north of Second street. There is no question raised as to any inadequacy of the street car service given by the Traction company north of Second street, but the petitioner seeks to justify its application for a certificate upon the ground that the public is better accommodated by the bus line than by the street cars. Undoubtedly many of the passengers now carried by the bus line in the territory north of Second street would and could with little or no inconvenience use the cars of the Traction company if the bus line were not in operation, and probably did patronize the Traction company before the bus line started. If this is true, then the Traction company is deprived of that revenue. Notwithstanding this, however, we must seriously consider whether the public is entitled to another means of transportation which may be more convenient for it regardless of whether an existing carrier may be deprived of earnings if such other transportation service should be authorized by this Commission. In considering this question of convenience we must give thought to more than the mere desire to have the vehicles of the carrier pass in close proximity to the abodes of intending passengers and to the distance which must be traversed in order to reach those vehicles.

Where the lines of the Traction company and the bus route are at the most not exceeding 952 feet apart, it is doubtful whether we can properly say that this in and of itself makes the bus line a necessity for the people in the northern part of the city of Troy. There can be no dispute but what it is more convenient, but this fact standing by itself is not sufficient to justify this Commission in depriving the existing carrier of an amount of revenue which may be just enough to enable it to earn a slight return on the value of the property which is used for the public benefit. There

are three propositions which must be considered in order that we may make a proper disposition of this case, and they are as follows:

First, Will the proposed auto bus service not only be convenient for the public but is it a necessity throughout its proposed route or any portion thereof?

Second, If a certificate of convenience and necessity is granted as requested, will it result in giving the bus line such a substantial portion of the traffic along its route which would otherwise go to the Traction company that the Traction company will suffer such a loss in revenue as to make it necessary to curtail the service now given along the lines with which the bus line will compete?

Third, If the earnings of the Traction company in the portion of the city of Troy north of Second street are seriously reduced by the operation of the bus line under the authority of this Commission, can the people in that portion of the city of Troy still insist before this Commission that there should be no curtailment of the service on the lines of the Traction company; and could this Commission require the present service to be maintained notwithstanding a reduction would be justified because of the loss in earnings due to the operation of the bus line?

The first question has been discussed somewhat in the earlier part of this opinion. Beyond what is there said the question still remains as to whether or not the public should be required to inconvenience itself to the slightest extent for the purpose of using the facilities of the existing carrier, the United Traction Company. Unquestionably, in unpleasant weather it is advantageous to have the facilities of the common carrier at the place most available for those who desire to ride; in fair weather it makes little or no difference to the average person if the distance which must be walked in any event does not exceed the length of three or four city blocks which is the maximum distance between the lines of the carrier in the present case. So far as the route

south of Second street is concerned, nothing in this case proves that the bus line is a necessity or would be a convenience. North of Second street there is some proof that it would be a convenience, but very little if any that it is a necessity excepting at the northern end of the stage route where it is claimed that the bus is much more convenient than the street cars. This territory at the north end of the bus line provides about 22 per cent of its business. Between Second and Eighth streets the lines diverge until they are approximately nine hundred feet apart. The distance between Second street and Eighth street is about thirty-two hundred feet, so that in this particular territory the necessity for the stage route does not exist to any marked degree excepting in the vicinity of Eighth street, and the public convenience probably increases in the same proportion as the distance between the route of the bus line and the trolley line from Second street to Eighth street. Therefore it seems to me the most that can be said is that the Commission might under proper conditions be justified in granting a certificate of convenience and necessity for the operation of a bus line north of Second street if it were possible so to do, but that the bus line ought not to be permitted to pick up passengers and discharge them in the territory south of Second street.

With regard to the second question, the proof is that at least 22 per cent of the traffic of the bus line originates and ends in the territory south of Eighth street, and that 78 per cent of its revenue is derived from passengers carried to and from the territory north of Eighth street. Few if any passengers board the busses north of Eighth street for the purpose of riding north; their destination is south of Eighth street. Of the revenue derived from passengers north of Eighth street, approximately 22 per cent is supplied from the neighborhood at the extreme north end of the stage line where it is not convenient for the people to use the lines of the Traction company although some of this traffic undoubtedly went to it before the bus line began to operate. We therefore

have a situation where probably at least 78 per cent of the revenue of the bus line is derived from passengers who would otherwise use the lines of the Traction company. The total revenue of the bus line for fifteen months was approximately \$38,500, so that the earnings of the Traction company were probably reduced at least \$30,000 due to the operation of the bus line. We have no evidence in the case to show exactly the effect which this had on the Traction company, but it goes without saying that this must of necessity be a serious loss to the lines running through the northern portion of the city of Troy. It might mean that by losing this revenue these lines operated at a loss, whereas without the loss the operations might have shown a profit. There is nothing in the case to show what the real fact is. Knowing the situation in Troy as regards the Traction company, it can safely be said that this loss has a material effect on its welfare so far as the Troy division is concerned. If 78 per cent of the passengers of the bus line are provided with reasonably good transportation facilities by the lines of the United Traction Company, can we properly say that notwithstanding this fact the petitioner should be granted a certificate of convenience and necessity because it will be somewhat more convenient for 56 per cent of the passengers to use the bus line on Fifth avenue rather than to take the trolley on the streets where it now operates north of Eighth street? In my opinion we can not do this and deal fairly with the Traction company, having regard to what it is sought to accomplish by the regulation of public utilities as contemplated by the laws of the State of New York. The policy of the State as it has been developed by this Commission is to protect the existing carrier so long as it provides reasonably good facilities for the public, and not to allow a competing carrier to come in unless the situation is one where the volume of business is such that the existing carrier is unable to handle it or fails to provide proper facilities and to give reasonably good service. If the Commission should grant

the certificate of convenience and necessity in this case, it would be in direct contravention of the policy which has heretofore been favored in this State, because the Traction company is giving good service in the territory in which the bus line wishes to operate south of Second street and there is not such a volume of traffic that the Traction company is unable properly to handle the same.

With regard to the third question, it is quite possible that as a result of the granting of this certificate of convenience and necessity as requested the traveling public in the northern portion of the city of Troy may suffer considerable inconvenience. If the Traction company continues the operation of its cars in the northern part of the city as at present, and after a fair trial it is demonstrated that the bus line is depriving the company of such an amount of revenue as to make the operation of the cars upon the present schedules a losing proposition, then it must be conceded that the Traction company would be justified in reducing the service in the northern part of the city. If this is done, what will be the result? The people who patronize the trolley lines will be inconvenienced because the people in another nearby portion of the city desire to have the additional facilities which will be afforded by the bus line. The parties feeling aggrieved will probably make an application to this Commission for a restoration of the former service. If the facts developed upon such an investigation demonstrate that notwithstanding the operation of the bus line the earnings of the Traction company on the lines in question are sufficient to justify the Commission in requiring the continuation of the existing schedule, then an order to that effect would undoubtedly be made. On the other hand, if it were shown that by reason of the invasion of its territory by the bus line the operating revenue of the Traction company was materially reduced, then we would not be justified in requiring the increased service requested. As a result, the people who have been accustomed to use the lines of the Traction company

would in a measure be discommoded because of the action of the Commission in granting the certificate of convenience and necessity to the bus line. In other words, it would not be a question of the greatest good for the greatest number but of the greatest good for a small percentage of the population of the city as against the convenience and welfare of a very large percentage of the population which has enjoyed this service for many years. It seems to me that from this standpoint alone the operation of the bus line south of Second street to pick up and discharge passengers ought not to be sanctioned by this Commission, as it would be if the certificate of convenience and necessity is granted. Particularly am I convinced that this is right because if an application were pending before the Commission for a certificate of convenience and necessity for another trolley line over exactly the same route as asked for by the bus line, the Commission would not be able to justify the granting of such a certificate. Why it should be any different because it is a bus line I am unable to comprehend.

The unfortunate part of this whole situation is the fact that the lines of the Traction company which serve that portion of the city north of Second street operate along the western edge of the city adjacent to the Hudson river while the stage route is operated practically through the center of this territory. The Traction company, therefore, is the victim of its location, which is due to the fact that when this line was originally built the situation as regards traffic was entirely different. The line of the Traction company with which the bus line competes operates northerly from the Green Island bridge on River street and Second avenue until it reaches the Waterford bridge. This is a portion of the route which was originally established by the Troy and Lansingburgh railroad many years ago from the Iron Works, in Troy, to Waterford. Presumably at that time the public was reasonably well accommodated by the location in Troy near the river because the city was not built up as far east

as at the present time. In the course of time the lines were electrified and became a part of the Troy City Railway which in turn became a part of the United Traction Company. The trolley line on the portion of River street and Second avenue above referred to throughout its entire length is double tracked and the street is paved. The Traction company pays taxes based upon a large assessment for this portion of its line. It is obliged to earn a substantial revenue in order to meet those taxes, and in addition it is obliged to keep the pavement between its tracks and for two feet outside thereof in good condition. No burden of this kind falls upon the bus line. Whatever it may contribute to the city is practically nothing as compared with the payments made by the Traction company toward the support of the municipal government. In addition to that, the Traction company is obliged to maintain power stations and car-barns to house its equipment; these are also taxed for the support of the government.

While nothing appears in the record upon this particular point, yet it may possibly be that the people in Troy have been disinclined to permit the operation of street cars upon Fifth avenue along the route traversed by the bus line, preferring to keep this avenue free from street car traffic. If that is true, ought the Traction company to be punished because of this desire on the part of the city, and should another carrier be permitted to operate over this route merely because it does not lay rails in the streets and erect poles and wires for the purposes of its business. The situation is one where all of these questions should be thoroughly considered, to the end that complete justice may be meted out to all parties, having in mind above all things the facilities to which the public is entitled. Every community of the size of the city of Troy must realize that while it may not be thoroughly satisfied with its transportation system, yet if an attempt were made to divide that business between two carriers the result would probably be that neither one of them

would earn enough out of the business to warrant the giving of first-class service. On the other hand, if the business is handled by one carrier, then the regulating power of the State will be used, to the end that the community may obtain the best possible service due regard being had of course to all other conditions which have a bearing upon the transportation situation. If a bus route in Troy can be operated so as to serve the public and at the same time not cause material harm to an existing carrier, then it ought to be favored; and this is so even though there may be some competition between the two carriers, provided it would not cause serious injury and where the convenience of the public would weigh much more heavily than the trifling loss which might be caused by competition. I realize that this is what may be termed a "border line" case in the matter of competition between bus lines and street railways, and yet I feel that the situation is one which ought to be worked out with little or no damage to either party. However, it will probably be found that if the bus line is not permitted to operate throughout its entire length as proposed it will be unable to earn a sufficient revenue to justify its continued operation. This in and of itself is one of the best arguments for refusing the certificate of convenience and necessity, because it is conclusive proof that the bus line in order to live must derive its revenue from traffic now being handled by the Traction company; and when this state of affairs apparently is bound to exist where a certificate of convenience and necessity is given, something more than has been presented in this case must be forthcoming in order to justify this Commission in approving and authorizing such competition. Inasmuch as this Commission probably has no power to grant a certificate of convenience and necessity which in its terms in any way attempts to abridge the grant of the city authorities, the situation can not be worked out at the present time to conform to my views. For the reasons stated, therefore, I think that the Commission ought not to grant the certificate of convenience and necessity requested by the petitioner.

In the Matter of the Complaint under section 27 of the Public Service Commissions Law of HARRY JACKSON of Newburgh *against* ERIE RAILROAD COMPANY, asking for a sidetrack and switch connection for his coal yard. [Case No. 5665.]

1. The word "shipper," as used in section 27 of the Public Service Commissions Law, was intended to include those who furnish business to the railroads by receiving shipments of freight and disposing of them to the public, as well as those who in the first instance forward such shipments from their points of origin.

2. The Commission has the power, under section 27, to direct the establishment of a private siding which does not connect with a sidetrack owned, operated, controlled by, and on the property of, the shipper.

3. Upon an application for sidetrack facilities in connection with a coal yard, it is not necessary that applicant shall be able to show that the total volume of the railroad's coal-carrying business in the municipality or district in which applicant's yard is situated will be increased as the result of establishing the desired facilities. The statutory requirement that the business shall be "sufficient to justify" the construction of a sidetrack, relates to the business of the applicant, and does not mean that the total coal business transacted in the neighborhood must show an increase in order to justify the Commission in ordering a sidetrack built.

4. The Commission may base its judgment as to whether an applicant's business is sufficiently large to warrant the granting of his application, upon the entire volume of the business he transacts, even though some of the coal in which applicant deals comes to him from points outside the State.

Decided November 23, 1916.

Appearances:

A. J. Fowler, 54 Second street, Newburgh, N. Y., attorney for complainant.

Harry Jackson, Newburgh, N. Y., the complainant, in person.

M. B. Pierce, 50 Church street, New York, its assistant general solicitor, for Erie Railroad Company, respondent.

EMMET, *Commissioner*:

The complainant in this case is a coal merchant of Newburgh who has been trying for some time past to persuade the Erie Railroad Company to furnish him with sidetrack facilities of substantially the same kind that several of his local competitors have been enjoying for a long time. Two years ago, with this in mind, he inquired into the practicability of establishing a coal yard near the so called West Newburgh switch, which had been built a few years before on land conveyed to the railroad by the Chamber of Commerce of Newburgh, partly in order to provide a great business enterprise newly established in the neighborhood with such switching and sidetrack facilities as were essential to its proper development, but largely in order that other new enterprises, coming afterward, might secure the same conveniences with a minimum of trouble and expense. Mr. Jackson conferred about the desired accommodation with the local freight agent of the railroad, and in company with this official visited the piece of land he was considering purchasing. Mr. Cleveland, the freight agent, expressed the opinion at that time that it would be entirely practicable to establish sidetrack connections such as Mr. Jackson wanted. When he said this he did not, we assume, intend to commit his company, in a legal way, to the building of a switch or sidetrack for Mr. Jackson. He had no power to do this, and was simply expressing his personal view that physical obstacles would not stand in the way of doing the work — a view which the testimony now before the Commission shows to have been entirely a correct one. Mr. Jackson, however, supposing that he was on perfectly safe ground so far as getting a sidetrack was concerned, bought the property, erected buildings upon it, and commenced to carry on his business there, making formal application to the railroad at about the same time for the desired facilities. He was not at all insistent upon any particular plan, in opposition to some other which the railroad might consider a better one.

All he asked was that a suitable sidetrack and switch be installed, and he has always been ready to pay out of his own pocket any proportion of the total cost of construction that might be thought fair and reasonable.

The railroad never committed itself definitely to any plan, but cars carrying coal were for a time stopped opposite Mr. Jackson's yard where they could be unloaded almost as conveniently as upon a private track. That practice continued from November, 1915, to April, 1916, and while it lasted seemed to be satisfactory enough to Mr. Jackson. When, however, it came to the railroad's notice that Mr. Jackson had purchased quite an expensive piece of machinery for permanent use in loading and unloading cars at this point — thus indicating an expectation on his part that the arrangement then in force, or some satisfactory modification of it, would last — the stopping of cars near the Jackson coal yard was summarily discontinued. Mr. Jackson, since then, has had to get his coal at a public siding in the neighborhood, which has involved the use of teams and has placed him at a considerable disadvantage in competing successfully with other coal merchants in Newburgh — five of whom, out of a total of six, have private sidings and are able in consequence to handle their product at a materially lower cost than is possible when trucking coal by teams has to be resorted to. The present proceeding has been brought to enforce what Mr. Jackson conceives to be his rights in respect to the establishment of suitable sidetrack and switching facilities in connection with his business.

No practical difficulty of any sort stands in the way of establishing proper switching and sidetrack facilities at Mr. Jackson's coal yard. This is admitted by the railroad, one of whose engineers has testified, with entire frankness, that such a siding could perfectly well be built, although not perhaps at quite so low a cost as Mr. Jackson had at first hoped it might be built for. According to this engineer's figures the portion of the work which would stand upon the railroad

company's own right of way would cost approximately \$735.14; that which would occupy property belonging to Mr. Jackson would cost approximately \$861.92. Mr. Jackson, upon hearing these estimates given in the form of testimony from the company's engineer, reiterated that although he had been under the impression that the work might be done at a somewhat lower cost, and in a less elaborate manner than the railroad now says is necessary, he is still entirely willing to pay his proper share of the cost of the sidetrack, built according to the railroad company's plans.

But the railroad now denies that Mr. Jackson is entitled to a sidetrack for several reasons which were never mentioned until after this proceeding had been brought. The railroad contends, in the first place, that Mr. Jackson is not a "shipper" within the meaning of that word as it is used in section 27 of the Public Service Commissions Law — that while he *receives* coal over the Erie railroad he does not send it out, and that this circumstance relieves the railroad from any obligations to him in this connection. Secondly, the railroad takes the position that before Mr. Jackson may properly ask for switch connections on the railroad's right of way he must himself have actually completed the building of sidetracks and switches upon his own property. And in the third place, it asserts that the amount of business which Mr. Jackson can assure to it is insufficient to warrant the maintenance of a private siding. The precise form which this last mentioned objection takes seems to present a new view — new at least to this Commission — of what section 27 of the Public Service Commissions Law (which prescribes the circumstances and conditions under which private sidings must, in certain cases, be granted to private individuals in connection with their business) really means. For the respondent seems not to question very seriously the fact that the volume of Mr. Jackson's business, measured by that of other coal yards in Newburgh, is considerable enough to place him in about the same category as his local

competitors, so far as his need of a sidetrack is concerned. In this phase of the matter the railroad says that it is not particularly interested. Its contention is that carriers need not, under the present law, install switching facilities and sidetracks in any case where the total amount of traffic which will come to the railroad from the locality in which the applicant's business is situated — in this case from the entire city of Newburgh and the surrounding neighborhood — will not be substantially swelled as the result of putting in these facilities. The trade which Mr. Jackson, in building up his business, has taken away, or may hereafter be able to take away, from other local coal merchants ought not to count, in other words, in any estimate made for the purpose of ascertaining whether Mr. Jackson does enough business to entitle him to a sidetrack of his own. This is not "new business," from the railroad's point of view. Mr. Jackson is not entitled to sidetrack connections, in this view of the case, unless he can demonstrate that the business he does, or will do, is business *in excess of any which has heretofore been done in Newburgh and its vicinity*. Otherwise no benefit to the railroad, from the building of a sidetrack for Mr. Jackson, can be figured out. Mr. Jackson might be benefited, of course, but that is something in which the railroad says that it is not particularly interested. The railroad also claims that only intrastate shipments to Mr. Jackson can be considered in estimating what the volume of his business is. Most of the coal that he receives comes from the Pennsylvania coal fields, and its transportation is thus interstate commerce. These shipments, the railroad maintains, should not be taken into account in determining whether the business done at Mr. Jackson's yard is sufficient to justify the present application.

These points have all been quite carefully considered by the Commission, and we shall now proceed, without extended argument or explanation, and in as brief fashion as possible, to state what our conclusions in regard to them are.

We think that the word "shipper," as used in section 27 of the Public Service Commissions Law, was intended to include those who furnish business to the railroad by receiving shipments of freight and disposing of them to the public, as well as those who in the first instance may have forwarded these shipments from their points of origin. This has been the view we have taken in several cases where applicants for sidetrack facilities have stood substantially in the position of the present applicant, and we can see no particular reason why we should take a different view now.

With regard to the respondent's second ground of objection — which is, that before the Commission can order a railroad to build a switch connection and sidetrack on its own right of way for the use of a private shipper, a connecting sidetrack must first have actually been constructed on the property of the applicant — we can find nothing in the law which would justify our reading any such meaning into it. We take this statute to mean that whenever the Commission has been duly impressed with the merits of an application of this kind, an order can properly issue to the railroad to do its share of the work, without regard to whether the applicant himself may have to do work on his own property in order to avail himself of the benefit he expects to derive from the work on the railroad's right of way. If the railroad's view is correct, the Commission would be without power to direct the establishment of a private siding which does not connect with a sidetrack owned, operated, and controlled by, and on the property of, the shipper. That this is not the meaning of the statute appears from the fact that the right of the Commission to direct the establishment of sidetrack facilities entirely on the railroad's right of way has, in a very recent case, been affirmed by the Court of Appeals of New York State. (*People ex rel. N. Y. C. R. R. Co. v. Public Service Commission*, not yet reported.)

With regard to respondent's third point — which is, that Mr. Jackson must show that the business which will come to

the railroad from the building of a sidetrack increases the volume of the railroad's coal-carrying business throughout the whole Newburgh district — we can see no merit in it at all. To construe the law in this way would be equivalent to saying that in our opinion the only purpose for which the law was passed was to swell the profits of the railroad — that in vesting the Public Service Commission with the power, under certain circumstances, to compel railroads, on applications from large shippers, to install suitable sidetrack and switching facilities, the Legislature had not in mind the interest or convenience of either the shippers or the public, but only of the stockholders of the roads. While we are quite alive to the fact that stockholders of railroads have certain very obvious and important rights which must always be considered in cases of this kind, and while we trust that as a Commission we shall never so far forget our duty as to overlook these, we find it difficult to believe that the suggestion that section 27 of the Public Service Commissions Law was enacted *solely for the purpose of swelling the profits of the carriers* (for that is what the objection we are now considering amounts to) is considered sound even by those who are now, from a sense of duty, bringing it to our attention. If that were the law, Mr. Jackson, before applying for sidetrack privileges, would have to be able to guarantee that the whole Newburgh region had already undergone, or would in the immediate future undergo, a noticeable and substantial growth as the result of his business enterprise, and that this growth, if not already reflected in larger profits for the Erie Railroad Company, would presently show itself in this way. It wouldn't be enough for him to show that *his* business — leaving general conditions in Newburgh out of account entirely — was flourishing. He might even have prospered to the extent of consolidating within his own yards the greater part of the coal business in Newburgh, and still, according to the respondent, he would not be entitled to sidetrack facilities unless he

could show also that the total coal consumption of Newburgh had been materially increased as the result of his activities. Surely the Legislature which enacted the Public Service Commissions Law had no such idea as that in its mind. According to our understanding it makes not the slightest difference, in a case of this kind, where the trade of an applicant for private sidetrack facilities comes from — whether he gets it at the expense of his present competitors or from the natural growth of the community he serves. It is sufficient for our purposes, and for his, that the business he does, no matter where he gets it from, shall be substantial in volume. The existing demand for coal in Newburgh might even show a steady falling off, with a consequent steady decrease in the railroad company's receipts, and still, in our opinion, Mr. Jackson would unquestionably be entitled to the facilities he asks for if, in competition with other local coal dealers, he has shown an ability to transact business on a scale which impresses the Commission as large enough to justify it in using the powers which section 27 of the Public Service Commissions Law gives it. That is our view of the meaning of this statute, and we state it categorically so that in case this decision shall come up for review hereafter in the courts there may be no doubt as to the grounds upon which it is based.

The final objection which respondent has raised to the granting of this petition is that by far the larger part of Mr. Jackson's shipments of coal come to him over the Erie railroad from Pennsylvania points, and that these are therefore interstate shipments and may not be taken into account by the Commission in determining whether the volume of Mr. Jackson's business is large enough to entitle him to the trackage facilities he seeks. This point would dispose of the case very effectually, of course, if it were well taken, because only very few of the shipments received by Mr. Jackson are strictly of an intrastate character. All his coal comes from points of origin outside New York. He does,

however, in the regular course of his business receive shipments of charcoal from points within New York state, and this fact gives the Commission unquestioned jurisdiction, it seems to us, over the subject matter of the present controversy. And our view is that, once the question of jurisdiction is settled, the Commission should base its judgment as to whether Mr. Jackson's business is sufficiently large to warrant the granting of his application, not upon the amount of his intrastate business alone but upon the entire volume of business he transacts. This precise question was involved, as we recall it, in the case of the *Lancaster Machine and Knife Works v. Erie Railroad Company* (IV P. S. C., 2nd D., 111), and we see no reason for changing the opinion in regard to it which we reached at that time.

The attitude of the Commission upon the several objections which have been raised to the granting of this application has now, we believe, been sufficiently indicated. We see no merit in any of them, and are of the opinion that Mr. Jackson has established his right to suitable sidetrack and switching facilities in connection with his present coal yard. It remains that we shall state the terms upon which, in our opinion, the work of establishing these facilities should be carried out and paid for. Under the circumstances the plans presented by the railroad at the hearing should, we think, be followed; we have no reason to suppose that these plans are unduly elaborate or expensive. Toward the cost of the work which will have to be done, both on the property of the shipper and on the railroad company's right of way, Mr. Jackson ought, in our judgment, if the track is to be built and maintained solely for his benefit, pay the entire cost of construction and maintenance except the cost of the rails, spikes, fish-plates, and other track metal which are used in the work. If, however, following this decision, it should be agreed between the parties that the Railroad company shall have the right to use the new track for general railroad purposes, in such a manner as not to

interfere materially with the shipper's use of it, the entire cost of construction and maintenance other than for track metal ought not to be borne by complainant alone. Final adjustment of this question may perhaps better be deferred until a further conference shall be had upon this point between the parties. If at such a conference it shall be determined that the track when built is to be used exclusively by Mr. Jackson, the cost ought, as above stated, be met by Mr. Jackson: otherwise by both parties in proportions which the Commission, upon subsequent application, will fix if the parties can not agree upon them. In the interest of orderly procedure a written instrument, setting forth the terms and conditions upon which the sidetrack is to be built and maintained, and containing the usual general provisions, now more or less standardized, which have recently been inserted in all such instruments, should be prepared and signed. If any difference of opinion shall arise between the Erie Railroad Company and Mr. Jackson over the form of this agreement, the points at issue may be submitted to the Commission at any time. An order will be entered embodying these conclusions and closing the case, for the present at least, upon the records of the Commission.

HODSON, *Commissioner*, dissenting:

I am opposed to any order in this case which will require the respondent to construct, maintain, or operate private sidetrack facilities for the complainant, because I am satisfied that the Commission would thus exceed its authority.

In the prevailing opinion, much reliance is placed upon the decision heretofore made by this Commission in the case of *Lancaster Machine and Knife Works v. Erie Railroad Company*. I dissented from that decision, and I am still unconvinced as to its correctness. I then said that I did not believe the law empowered this Commission to require a railroad company to go off its right of way to operate a

private sidetrack upon the land of another. Much less do I now believe that we have the power to require the railroad company to construct or participate in the construction of a private sidetrack upon the premises of the complainant, when, as I contend, the full measure of authority vested in the Commission, with reference to a private sidetrack, is to require a switch connection to be put in, maintained and operated by the railroad corporation, between its line of railroad and a private sidetrack owned, operated, or controlled by any shipper tendering traffic for transportation. This is the exact language of section 27 of the Public Service Commissions Law—the only statutory authority which empowers this Commission to act in the premises; and it is thus contemplated, it seems to me, that such private sidetrack must be furnished and brought by the owner to the point of connection, before any obligation is imposed upon the railroad corporation; although I agree that the switch connection might be ordered installed by the railroad company concurrently with the construction of the private sidetrack by such shipper.

In order that we may have this question clearly presented, section 27 of the Public Service Commissions Law is here given in full:

Sec. 27. Switch and side-track connections; powers of commissions.

—1. A railroad corporation, upon the application of any shipper tendering traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection or connections with a lateral line of railroad or private side-track owned, operated or controlled by such shipper, and shall, upon the application of any shipper, provide upon its own property a side-track and switch connection with its line of railroad, whenever such side-track and switch connection is reasonably practicable, can be put in with safety and the business therefor is sufficient to justify the same.

2. If any railroad corporation shall fail to install or operate any such switch connection with a lateral line of railroad or any such side-track and switch connection as aforesaid, after written application therefor has been made to it, any corporation or person interested may present the facts to the Commission having jurisdiction by written petition, and the Commission shall investigate the matter

stated in such petition, and give such hearing thereon as it may deem necessary or proper. If the Commission be of opinion that it is safe and practicable to have a connection, substantially as prayed for, established or maintained, and that the business to be done thereon justifies the construction and maintenance thereof, it shall make an order directing the construction and establishment thereof, specifying the reasonable compensation to be paid for the construction, establishment and maintenance thereof, and may in like manner upon the application of the railroad corporation order the discontinuance of such switch connection.

It appears from the record in this case that the railroad company has presented some plan for a sidetrack in this matter, which, in some respects, it is proposed to adopt; and it may be that the company will accept the order of the Commission; but such a course would not change my views with reference to the construction of the law above quoted.

I also disagree with the conclusion reached in the opinion of Commissioner Emmet with reference to the duty of this Commission to take into consideration purely interstate traffic in determining cases of this kind. True, the *Lancaster case* did involve this very question, and the conclusion there reached was that, although substantially all of the traffic was interstate, still such traffic should not be separated from the intrastate and the latter only taken into consideration for the purposes of that case. This reasoning is followed in the decision of this case. The Commissioner's language is well chosen when he says that "our view is that, once the question of jurisdiction is settled, the Commission should base its judgment as to whether the applicant's business is sufficiently large to warrant the granting of the application". Of course this is a proper conclusion, provided the facts and the law justify it. But I hold that it is not settled that this Commission ever obtained jurisdiction over the interstate freight of the applicant; and, further, that the same is lodged with the Interstate Commerce Commission, which has ample power to direct the installation of switch facilities for interstate business, under the federal act to regulate commerce, just as this Commission is empowered by section

27 of the Public Service Commissions Law to do the same thing for intrastate business.

If this is a fair statement of the law, Federal and State, governing matters of this kind, I believe it necessarily follows that the "business" mentioned in section 27 of the Public Service Commissions Law must be limited to "property transported from one point to another within the State of New York" as defined by section 25 of that law, which is another way of distinguishing intrastate from interstate traffic.

There are other questions presented by the respondent in this case which may be entitled to more than passing notice, but I do not deem it essential to discuss them at this time, because I am of the opinion that both of the objections to which I have briefly referred, preclude this Commission from granting affirmative relief in this case, and that the petition herein should be denied.

In the Matter of an Inquiry by the Public Service Commission for the Second District of the State of New York as to the reasonableness of the notice given by THE DELAWARE AND HUDSON COMPANY and THE NEW YORK CENTRAL RAILROAD COMPANY of changes in the timetables effective December 4, 1916, relative to the belt line service between Albany and Troy. [Case No. 5807.]

December 6, 1916.

By the Commission:

It having been brought to the attention of this Commission that The Delaware and Hudson Company and The New York Central Railroad Company have made radical changes in the number and method of operation of the belt line trains between Albany and Troy beginning on December 4, 1916, an inquiry in reference thereto was instituted by the Commission beginning on December 4, 1916, and continuing on December 5, 1916. At the request of the Commission, representatives of the two railroad companies involved appeared before it at its office in Albany on December 5, 1916, for the purpose of presenting the facts in the matter to the Commission. The trains on the belt line between Albany and Troy have been in operation by The Delaware and Hudson Company and The New York Central Railroad Company and their predecessors since about 1881, pursuant to an agreement covering such operation. For many years the two companies have provided trains for the accommodation of passengers to and from Albany and Troy and stations intermediate thereto every half hour for about eighteen hours per day. The Delaware and Hudson Company operated such trains from Albany to Troy on the east side of the Hudson river and back to Albany on the west side of the river, and The New York Central Railroad Company operated its belt line trains in the reverse direction. On December 4, 1916, many of the trains which had thereto-

fore been operated over the belt line were discontinued, other operating changes were made, and no notice to the public was given earlier than the afternoon of Friday, December 1, 1916. As a result, many of the people who had been in the habit of using these trains almost daily were not advised as to the proposed drastic changes in the operation of these trains and were seriously discommoded and inconvenienced. Altogether, about twenty-six changes were made in the timetable relating to the trains of The Delaware and Hudson Company and about twenty-five in that relating to the trains of The New York Central Railroad Company. That this was bound to cause a great deal of inconvenience and annoyance to the traveling public must be admitted when taken in conjunction with the fact that no proper and adequate notice was given of the proposed changes. This service having been in operation for so many years without change undoubtedly justified the traveling public in Albany and Troy and stations intermediate thereto in relying upon the usual operation until notice of the radical changes proposed was brought to its attention. It has been the custom in the past for the two companies which are involved to notify the Commission about one week in advance of any proposed changes in operating schedules and to give similar notice to the public. The intent of this is apparent. It is for the purpose of enabling the public properly to adjust itself to the changes, to make protest to this Commission if such changes will apparently cause hardship or inconvenience, and to advise the Commission so that it may make any suggestions which seem to it pertinent with reference thereto. As a matter of fact, the representatives of The Delaware and Hudson Company had discussed to some extent with this Commission a proposed curtailment of the belt line service but no definite recommendation was made by the representatives of the Commission concerning such changes. Both of the railroad companies had under discussion for some time prior to December 1st the question of reducing this service, and in

fact agreed upon the schedule now in force on November 29, 1916, and had tentatively agreed to it on November 24th. Notwithstanding this fact, however, no notice was given to the public nor was any attempt made to give any prior to the afternoon of December 1st. No effort was made to call this important matter to the attention of patrons of the road in a noticeable way or through the medium of the public press; and in fact, it would almost seem from the evidence taken upon the hearing that it was the desire not to take the public into the confidence of the railroads with regard to the proposed changes. From the knowledge of the situation which has come to the Commission through the investigation made by its representatives and upon the hearing, it is our opinion that this was a most high-handed proceeding and in absolute disregard of the rights of the public and the duty which common carriers owe to the public to give reasonable and adequate service. To change a service of this character which had been in operation for so many years without giving the fullest publicity to the proposed radical and important changes in the operation of the belt line trains is, we believe, inexcusable, and a most positive demonstration of the disregard of the rights of the public and ought not to be permitted to pass without severe censure. Many complaints have been made to the Commission verbally and in writing concerning the changes in the timetables and the discontinuance of trains on the belt line and demanding that the service be restored as it was prior to December 4th. One of the purposes of instituting this inquiry was for the purpose of ascertaining if the Commission could properly and lawfully order a restoration of the service without proceeding to take testimony concerning all the facts pertaining to the operation of the belt line trains. We are constrained to believe that it is questionable whether we have such power, and for that reason such an order properly can not now be made. We are, however, convinced that it is our duty to proceed further in the matter and with all

possible dispatch to determine whether or not we should order a restoration of the belt line service to what it was prior to December 4th. Inasmuch as the change which has been made in one respect has the effect of increasing the rates between Albany and Troy, the Commission felt that it was justified in asking the railroad companies to restore the former service pending the inquiry which it proposes to make. It therefore upon the hearing requested the representatives of each corporation to take that action pending the termination of the inquiry to be made by the Commission in this matter. This request was promptly acceded to by the representatives of The New York Central Railroad Company but The Delaware and Hudson Company stated that it would not comply with the request of the Commission. Under this state of affairs, therefore, notwithstanding the willingness of The New York Central Railroad Company to restore the service, it is unable so to do because of the refusal of The Delaware and Hudson Company to join in such operation. Therefore apparently there will be no voluntary changes made by the railroad companies in such operation, and therefore the present schedule will probably continue at least until the Commission shall make some order requiring a change.

It is proper for us to state that when this matter was first presented to the Commission by one of the complainants on the morning of December 2nd, the Commission formally requested The Delaware and Hudson Company to suspend the taking effect of the new schedules pending a hearing on the merits concerning the reduction in service, but this request was refused. Had it been granted, opportunity would have been afforded to investigate the question quickly and to determine whether or not such changes in service were justified. This might have been accomplished without any serious detriment to the companies involved and without causing serious inconvenience to the people who depend upon this service.

The situation that has been presented to the Commission in this case shows conclusively that much trouble and inconvenience may be caused to the traveling public by the arbitrary acts of a railroad corporation. It may have been thought by some people that the days of such arbitrary acts had passed, but it is apparent to us from what has developed in this case that they have not. There is a way to remedy it, and that is for the Commission to require every railroad within its jurisdiction to file with the Commission the details regarding all changes in timetables at least seven days before the same are to go into effect, and to give similar notice to the public in a manner to be prescribed by the Commission. In that way the Commission would be informed of any changes which might cause inconvenience or annoyance to the public and have an opportunity to examine into the matter if such action appears to be justified. We are fully convinced that this is one matter relative to regulation which properly comes within the jurisdiction of the Commission, because this is something which is of much importance to the traveling public particularly when such radical changes are made as have been disclosed in the present case. An order should therefore be made providing for an immediate investigation into the subject of the adequacy and reasonableness of the service on the Albany-Troy belt line, and a date for an early hearing thereon fixed by the Commission.

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Capitalization.

1. The purchaser must be presumed to have acquired his securities with full knowledge of the terms of the mortgage under which issuance of additional bonds may from time to time be made. If conditions of the mortgage are complied with and such additional issue approved, the order must stand unless shown to have been granted in misapprehension of essential facts, or a deliberate exercise of bad faith by the corporation is established. To justify issue of bonds to finance an extension of service it need not be unquestionably demonstrated that the enterprise will prove immediately remunerative. Determination of far reaching questions involved in problems of extensions is properly intrusted to the discretion of the directors of the enterprise. *Marvin Shiebler v. Suffolk Gas and Electric Light Company.* 23

2. When a corporation has established its right to issue securities of a character and in an amount and for a purpose which is deemed proper, and has complied with all incidental accounting requirements, and no evidence in dispute of the Commission's conclusions has been presented or offered other than may be derived from the pendency of an equity suit against the corporation in which minority stockholders seek to establish that the indebtedness to discharge which the securities are to be issued was improperly incurred by its directors, an adjournment of the proceeding until the determination of the equity suit, and consequent delay in granting the relief to which it has been determined the applicant is entitled, would be an unwarranted exercise of discretion, because it would be tantamount to restraining the applicant from the exercise of a substantial right against which it may properly be enjoined only by a court of competent jurisdiction. *Application of The Long Island Railroad Company.* 67

3. Under subdivision 10 of section 8 of the Railroad Law, when properly consented to, bonds of a railroad corporation may be made convertible into its stock at a price less than the par value thereof, but such price may not be less than its market value at the time the stockholders' consent is given to the mortgage. Circumstances under which approval of an issue of bonds convertible into stock at 50 per cent of the par value should be considered a proper exercise of discretion, discussed. *Petition of Erie Railroad Company.* 108

4. Under sections 55 and 60 of the Public Service Commissions Law, common carriers, railroad, street railroad, gas, and electrical corporations are expressly authorized to issue securities for the purpose of maintenance of service and of making replacements, when approved by the Commission. In such an order of approval the purposes for which such securities or the proceeds are to be used must be distinctly stated and certified, and the transaction safeguarded by a requirement for due and timely amortization or a provision for other method of extinguishment of the charges thus created. *Petition of Binghamton Light, Heat and Power Company.* 172

Certificate of Convenience and Necessity.

1. Chapter 667 of the laws of 1915 repealed section 25 of the Transportation Corporations Law. In order lawfully to operate an auto bus for the carrying of passengers over any route which covers city streets, the owner must obtain a permit therefor from the local authorities, and must also obtain a certificate from the Commission. On an application for certificates to operate specified routes within the city which are part only of through routes extending beyond the city line, it was held that such certificates should be granted even though it appears that another public utility, a street railroad line, would probably suffer the loss of some revenue by such competition. It is not necessary that all competition shall be considered unjust, as the convenience and necessity which are

sought to be satisfied are not confined to the residents of the city alone, and the use of the through routes requires continuous transportation in and through the streets of the city from suburban points. *Petitions of LeRoy D. Becraft and James E. Adams.* 51 *Petitions of Allen P. Bartholomew and John J. Neil.* 96 *Petition of Carpenter's Bus Line, Inc.* 204

2. A certificate should not be issued if the Commission believes that the ultimate effect of granting it will be detrimental rather than helpful to the community affected, nor where the obvious or likely consequence would be to arrest the further development of electric railways in a large and growing city, unless the existing system can not or will not supply the reasonable requirements of the community. *Petition of T. S. Ashmead et al.* 215

3. The phrase "public convenience and necessity," as used in chapter 667 of the laws of 1915, is to be taken as an entirety. It is not necessary that the Commission should find that the line is strictly a necessity as well as a convenience. The proper condition exists when it will meet a reasonable want of the public and supply a need, if existing facilities, while in a sense sufficient, do not adequately supply that need. Under the facts stated, a certificate was granted to a stage route about three and one-half miles in length, although for ten thousand feet it is one block from and parallel to an existing street railroad line, and through the remainder of its distance less than one thousand feet therefrom. It is not necessary to sell at public auction a municipal consent therefor under the Second Class Cities Law. *Application of Troy Auto Car Company, Inc.* 396

Certificate of Public Convenience and a Necessity.

A railroad corporation's route, as proposed in the certificate of incorporation, is from a point on the line of the Buffalo, Lockport and Rochester Railway Company's right of way, in Lockport, near the easterly boundary, to the easterly bank of the Niagara river, in the town of Lewiston. The applicant relies for a large part of its business upon a Canadian transcontinental railroad now eighty miles from the Niagara Gorge, planned to be built across the Gorge by a bridge not yet constructed. It appeared that by building about four miles of the easterly end of the proposed route, connecting the line of the Buffalo, Lockport and Rochester Railway Company with the International Railway Company at Hinman, around the easterly and southerly sides of Lockport, a large freight traffic would be accommodated and a necessary outlet for the first named corporation, provided. It was not seriously contended that the sixteen miles of rural territory between Hinman and the Niagara river required the building and operation of the road, because the proposed route parallels the New York Central for almost the entire distance. Held that the Commission is without legal authority to divide the route proposed and grant a certificate for any part, or a certificate conditioned upon the happening of any future event; also that the applicant had failed to show that public convenience and a necessity required the construction of a railroad as proposed in its certificate of incorporation. *Application of Niagara River & Eastern Railroad Company, Inc.* 348

Common Carrier.

A boat line handling freight from and to points on the Hudson river is not one of the common carriers entitled to relief under the provisions of section 35 of the Public Service Commissions Law. *Edward P. Murray v. The Delaware and Hudson Company.* 163

Competition.

It is not the policy of the Commission to protect a lighting corporation in what it claims is its natural territory unless it makes some effort to provide for the business therein and give to the public the service to which it may be fairly entitled. *Petition of Colliers Light, Heat and Power Company.* 90

Crossing, Street and Steam Railroads.

The Commission is without authority to determine whether or not a street is a public highway, thereby subjecting the railroad corporation to the obligation set forth in section 93 of the Railroad Law where such street crosses the tracks by an overhead bridge. Until such determination the Commission can only exert its power to safeguard the public upon the bridge. It seems that the railroad corporation is obligated primarily to maintain the bridge under the provisions of section 93. *City of Middletown v. Erie Railroad Company and Wallkill Transit Company.* 100

Definitions.

1. "Public convenience and necessity," and "Franchise," under section 53 of the Public Service Commissions Law. *Joint Application of The New York, Lackawanna and Western Railway Company and The Delaware, Lackawanna and Western Railroad Company.* 149

2. "Common Carrier," under section 35 of the Public Service Commissions Law: A boat line handling freight from and to points on the Hudson river is not. *Edward F. Murray v. The Delaware and Hudson Company.* 163

3. Subdivision 13 of section 2 of the Public Service Commissions Law defining electrical corporations is to be construed in connection with section 1 and all other provisions of the law. A manufacturing corporation does not assume to act as an electrical corporation by generating current for its own use and transmitting it across a street or across other public property. *Fulton Light, Heat and Power Company v. Granby Pulp and Paper Company et al.* 340

4. "Public convenience and necessity," in chapter 667 of the laws of 1915. *Application of Troy Auto Car Company, Inc.* 396

5. The word "shipper," as used in section 27 of the Public Service Commissions Law, includes those who furnish business to the railroads by receiving shipments of freight and disposing of them to the public, as well as those who in the first instance forward such shipments from their points of origin. *Harry Jackson v. Erie Railroad Company.* 415

6. The statutory requirement that the business shall be "sufficient to justify" the construction of a sidetrack relates to the business of the applicant, and does not mean that the total coal business transacted in the neighborhood must show an increase in order to justify the Commission in ordering a sidetrack built. *Id.*

Discrimination.

1. The law of regulation as now administered does not contemplate that one carrier, regardless of its own interests as well as those of the public, should be obliged to so conduct its operations as to best accommodate the business of a competing carrier. *Edward F. Murray v. The Delaware and Hudson Company.* 163

2. When a railroad corporation proposes to re-locate a transfer terminal where it interchanges freight with boat lines, and it appears that the interests of the public will not be unduly prejudiced by such change, the Commission should not attempt to prevent such action even though it had authority so to do. *Id.*

3. On the facts stated, held that the refusal of an express company to extend its free collection and delivery limits so as to include the place of business of the complainant operated as an unjust discrimination. *Frank B. Saunders v. American Express Company.* 180

Employees, Safety of.

As a matter of general policy, and from the standpoint of safety to train employees, a lesser clearance than twenty-one feet of a highway bridge to be built in connection with

a grade crossing elimination should only be allowed under circumstances which would unanswerably justify such departure as a proper exception to the general rule. *Petition of The Long Island Railroad Company.* 136

Fares.

1. To ascertain a reasonable intrastate passenger rate, the entire passenger traffic, interstate as well as intrastate, should be considered. *Matter of Proposed New Passenger Fares, The New York Central Railroad Company.* 230

2. In apportioning operating expenses between passenger and freight service, the method adopted by the Interstate Commerce Commission in the Western Passenger Rate Case was pursued by the corporation and accepted as sufficient in the present case. In apportioning operating expenses between interstate and intrastate traffic, the Commission refused to base the apportionment on the ratio between intrastate passengers and interstate passengers, but upon the ratio between intrastate and interstate passenger-miles. *Id.*

3. Divisions which are profitable can not be made to bear the cost of transporting passengers on the unprofitable divisions to the full extent of such losses. Increased fares will not be approved for the purpose of making the rates of all carriers equal. There must be established the necessity for additional revenue in order to earn a fair return. The corporation having failed to show justification of the proposed increases on one division while others might be justified, all were ordered canceled in order that the corporation might work out new tariffs consistent with conclusions reached and eliminating certain discriminations discovered in the course of the investigation. *Id.*

4. Chapter 216, laws of 1846, incorporating the Hudson River Railroad Company, and limiting passenger fares between New York and Albany to 2 cents per mile, was repealed by implication by the General Railroad Law of 1850 (*Johnson v. Hudson River R. R. Co.*, 49 N. Y. 455). *Id.*

5. While the cost per train-mile of operating the "belt line" passenger trains between Albany and Troy by two corporations is more than the revenue per train-mile therefrom, there was no evidence as to the revenues and expenses of other traffic over the same tracks; and it was held that in the absence of such evidence the corporations had failed to sustain the burden of showing the justness of the proposed increase. *Id.*

6. A proposed increase of fares on a particular line was defended on the ground that the revenues on its entire system were insufficient to enable it to earn a fair return, and that the selection of this particular route for an increase was within the managerial discretion of the corporation. It was held (a) that it had failed to show that the particular line concerned was unprofitable, taken by itself or by comparison with other lines; (b) that the increase would impose upon passengers on this line from two to three times as high fares as upon passengers on other lines for as great or greater distances: a discrimination unlawful and (c) not justified; (d) that section 181 of the Railroad Law restricting fare to 5 cents in an incorporated city is no longer operative if the corporation is unable to earn a fair return; (e) that one class of patrons may not be subjected to a rate in itself unreasonably high in order to recoup losses sustained in serving other classes at unprofitable rates even if the unprofitable rates are imposed by law. *Matter of United Traction Company's Proposed New Passenger Fares and Charges.* 287

7. Under section 29 of the Public Service Commissions Law as amended by chapter 240, laws of 1914, the burden of proof is upon the carrier to justify an increase of rates, and a case will not be reopened which has proceeded upon the theory that the increase suspended was justified because the intrastate revenue was less than the intrastate cost, which was found not to be the fact as to certain lines, and there being no suggestion that evidence of value was omitted because of accident, surprise, or ruling of the Commission. Such refusal does not preclude the corporation from filing such new tariffs as it may feel able

to support by any proper evidence should another contest arise. The Commission could not originally or on rehearing consider whether certain fares not increased by the suspended tariffs should properly be increased, assuming the Commission has in a proper proceeding authority to authorize such increase. *Matter of Proposed New Passenger Fares, The New York Central Railroad Company.* 309

Franchise.

1. A telephone corporation, several years before the sale of its physical property, had increased its rates beyond those fixed in the franchise, and there had been a general acquiescence in such increase; held that a demand on the successor corporation to restore the original rates is stale. *Board of Trade of the Village of Malone v. Mountain Home Telephone Company.* 74

2. The contention of a lighting corporation that another lighting corporation should be denied the right to exercise a franchise in an adjoining municipality in which the objecting corporation has no franchise, can not be sustained merely on the ground that at some indefinite time it may elect to extend its lines into such adjoining municipality. If the objecting corporation has slept on its rights and failed to develop the business in a territory available to it for many years, it can not complain when another corporation takes advantage of the opportunity and obtains a franchise. *Petition of Colliers Light, Heat and Power Company.* 90

3. The duration of a grant of a city to construct a switch track or siding across a public street "subject to the further orders of the Council of the City of Buffalo," is a question to be adjusted by the courts in case there is a dispute between the parties. It is a franchise within the meaning of section 53 of the Public Service Commissions Law, the exercise of which may be approved by the Commission. *Joint Application of The New York, Lackawanna and Western Railway Company and The Delaware, Lackawanna and Western Railroad Company.* 149

4. The Commission's approval of a gas franchise which upon its face is regular, and which appears to have been lawfully granted by the local authorities, should not be withheld merely because a private individual expresses at the hearing his personal belief that the franchise was fraudulently made and procured but does not present evidence to substantiate this suspicion. *Petition of South Shore Gas Company.* 161

5. Where the maximum rate for natural gas is restricted to 40 cents per M cu. ft. by the terms of a municipal franchise, a minimum charge of 50 cents for such gas service is unauthorized: by enforcing the same the company might thereby exact a maximum charge greater than the amount prescribed. *Inhabitants of the Village of LeRoy v. The Pavilion Natural Gas Company.* 186

6. A permit granted by municipal authorities to maintain a wire or wires across a public street, or by the Superintendent of Public Works to maintain such a wire over state lands, for the purpose solely of transmitting current generated by the grantee for his own use is not such a franchise as requires the consent of the Public Service Commission before it can be exercised. *Fulton Light, Heat and Power Company v. Granby Pulp and Paper Company et al.* 340

7. If a corporation not within the exceptions of section 36 of the General Corporation Law does not organize and commence the transaction of its business or undertake the discharge of its corporate duties within two years from the date of incorporation, it becomes incapable of purchasing, receiving, or holding any property or franchises. *Northern Adirondack Power Company v. J. & J. Rogers Company.* 391

8. The municipal consent to the operation of stage lines within a city required by chapter 687, laws of 1915, is not a franchise under section 37 of the Second Class Cities Law requiring that franchisees must be disposed of at public auction. *Application of Troy Auto Car Company, Inc.* 396

Grade Crossing Elimination.

1. After determining that there should be a clearance of not less than twenty-one feet between the top of the rails and the lowest point of the overhead construction of a highway bridge, the order will not be modified to permit a sixteen-foot clearance only upon proof of militating conditions which did not exist or the existence of which was overlooked at the time of the original determination. As a matter of general policy, and from the standpoint of safety to train employees, a lesser clearance than twenty-one feet should be allowed only under circumstances which would unanswerably justify such departure as a proper exception to the general rule. *Petition of The Long Island Railroad Company.* 136

2. Although it is the settled policy of the State, as well as the City of Buffalo where there is a local Grade Crossing Commission, to eliminate all dangerous crossings, it is not a departure therefrom to approve the construction of a switch track across a street in the railroad and industrial section of that city when authorized and its operation regulated by the city. *Joint Application of The New York, Lackawanna and Western Railway Company and The Delaware, Lackawanna and Western Railroad Company.* 14

Grade Crossings, Highways.

1. Under section 90 of the Railroad Law, the procedure is for the municipal authorities, after notice and hearing, to determine the necessity of opening a new street or portion of street; and having determined that such opening is necessary, to apply to the Commission to determine whether such street shall pass over or under such railroad, or at grade. The Commission has no authority to determine the necessity of opening such street or to determine the grade until after the municipal authorities have determined the necessity of the street. *Petition of Board of Public Works of Rome.* 326

2. In case of a new highway not part of a state or county highway, constructed as an essential part of the elimination of one or more existing grade crossings, the expense of construction of the highway and approaches, whether such new crossing be at, over, or under grade, shall be shared between the corporation (one-half), the municipal corporation (one-quarter), and the State (one-quarter), except that if the crossing is at grade the cost of installing and maintaining incidental safeguards prescribed by the Commission must be borne by the railroad corporation. If it is not part of an elimination plan: if it be over or under grade, the expense shall be borne equally by the railroad corporation and the municipal corporation; if at grade, no part is chargeable to the railroad corporation except the planking at the outside of and between the rails required by section 21 of the Railroad Law, and the installation and maintenance of the prescribed incidental safeguards. If the crossing be over grade, the cost of necessary approaches must be taken into consideration, and only so much of the cost of such approaches as is represented by actual expenditure in excess of that which necessarily would have been incurred if the crossing had been at grade is to be included in the account. *Petition of Town Board and Town Superintendent of Highways, Town of Barton.* 380

3. When the danger of collision with trains would be superseded by serious danger of vehicular collision incidental to the new construction, a proposed plan of elimination should not be approved. In case of a country road of limited use, traffic on which was proposed to be diverted to a new road to connect at an acute angle with an improved and largely used highway at a point where the latter emerged from a railroad under-crossing, such danger of vehicular collision at the intersecting point arising from impaired view occasioned by the railroad embankment outweighs the dangers of the present crossing. *Petition of The New York Central Railroad Company.* 388

Mortgages, Railroad.

1. A mortgage can not be issued by a railroad corporation unless consented to by the owners of at least two-thirds of the outstanding capital stock of the corporation, given in

writing or by vote of a special meeting of stockholders called for that purpose. *Petition of Erie Railroad Company.* 108

2. An extension of the period in which conversion of bonds into stock was allowed was held to constitute such a modification of the mortgage as to require a new consent of stockholders. In this case, the prior consent provided for conversion at a price not less than the market value of the stock on the date of the consent and the extension was for conversion at a fixed price exceeding the market value both at the date of the stockholders' consent and at the present time. *Id.*

3. Under subdivision 10 of section 8 of the Railroad Law, when properly consented to, bonds of a railroad corporation may be made convertible into its stock at a price less than the par value thereof, but such price may not be less than its market value at the time the stockholders' consent is given to the mortgage. Circumstances under which approval of an issue of bonds convertible into stock at 50 per cent of the par value should be considered a proper exercise of discretion, discussed. *Id.*

Natural Gas Corporation.

A natural gas corporation which carries its product through service pipes into a high pressure transmission line should not be restrained from installing and operating a mechanical device known as a compressor, to accelerate the flow of gas through the service pipes and thus increase the pressure to that existing in the transmission line. On complaint by land owners against lessee corporations that the compressor unlawfully and unreasonably increases the flow of gas from the wells thereby causing loss to the complainants, the Commission is without jurisdiction to restrain such use; and holds that such matters relate to the private rights of the parties and do not concern the interests of the public. *Town of Brant & al. v. Iroquois Natural Gas Company & al.* 374.

Powers of the Commission.

1. The Public Service Commissions Law does not give the Commission power to determine whether or not a lighting district in a town has been established in the manner required by law. *Petition of Colliers Light, Heat and Power Company.* 90

2. The effect of chapter 667, laws of 1915, was to deprive the Commission of authority to control or regulate competition of bus lines or stage routes outside of cities among themselves or with other carriers. *Petitions of Allen P. Bartholomew and John J. Neil.* 96

3. The Commission is without authority to determine whether or not a street is a public highway, thereby subjecting the railroad corporation to the obligation set forth in section 93 of the Railroad Law where such street crosses the tracks by an overhead bridge. *City of Middletown v. Erie Railroad Company and Wallkill Transit Company.* 100

4. The present law as to stage routes and auto busses (Transportation Corporations Law, sections 25 and 26, as amended in 1915) relates only to operation in cities. Neither this Commission nor the local authorities may use the power conferred for the purpose of regulating operation or controlling competition outside the city. *Petition of Carpenter's Bus Line, Inc.* 204

5. Alongside an abandoned state canal are the railroads of two corporations, the predecessor of one corporation having built its railroad on the disused tow-path under conveyance from the State; the up-keep of the prism and banks is in dispute; held that the obligation for such up-keep would be contractual, and that the Commission can not compel repairs to prevent flooding of adjoining lands. *Robert E. Harbeck v. The Pennsylvania Railroad Company and Genesee River Railroad Company (Erie Railroad Company).* 213

6. Because a defendant in a pending judicial proceeding is a public service corporation, the Commission can not grant a remedy provisional or ancillary to that proceeding. *Joint Petition of North Shore Electric Light and Power Company and Port Jefferson Electric Light Company.* 314

7. Under section 90 of the Railroad Law, the procedure is for the municipal authorities, after notice and hearing, to determine the necessity of opening a new street or portion of street; and having determined that such opening is necessary, to apply to the Commission to determine whether such street shall pass over or under such railroad, or at grade. The Commission has no authority to determine the necessity of opening such street or to determine the grade until after the municipal authorities have determined the necessity of the street. *Petition of Board of Public Works of Rome*. 326

8. Section 62 of the Transportation Corporations Law makes it the absolute duty of a gas corporation, subject to the conditions of that section, to supply gas to the owner or occupant of any building or premises within one hundred feet of its mains. If the distance be more than one hundred feet, the Commission may require service to be rendered if it is reasonable so to do. If the Commission determines that it is reasonable, it may fix the terms upon which it should be rendered. *John P. Draney et al. v. Central Hudson Gas and Electric Company*. 334

9. The authority of the Commission to eliminate grade crossings does not include power to ameliorate the danger by compelling the removal of physical obstructions to a free view of the approach from either direction. *Petition of The New York Central Railroad Company*. 338

10. When material changes were made December 4th in the operation of Belt Line trains between Albany and Troy, discontinuing trains on notice given not earlier than December 1st, the Commission held it questionable whether it could order a restoration of service without proceeding to take testimony concerning all the facts pertaining to the operation of Belt Line trains. A further hearing was directed. *Id.*

Public Service Commissions Law.

1. Section 2, subdivision 13: Electrical corporations defined. *Fulton Light, Heat and Power Company v. Granby Pulp and Paper Company et al.* 340

2. Section 27: When Commission may direct the establishment of a private siding. *Harry Jackson v. Erie Railroad Company*. 415

3. Section 29 as amended by chapter 240, laws of 1914: Burden of proof on application for rehearing. *Matter of Proposed New Passenger Fares, The New York Central Railroad Company*. 309

4. Section 50: Location of station. *Residents of West Falls v. Buffalo, Rochester and Pittsburgh Railway Company*. 297, 330

5. Section 53: Franchise includes grant from a city of the right to construct and operate a switch track or siding. *Joint Application of The New York, Lackawanna and Western Railway Company and The Delaware, Lackawanna and Western Railroad Company*. 149

6. Sections 55 and 69: Capitalization for the purpose of maintenance of service and making replacements. *Petition of Binghamton Light, Heat and Power Company*. 172

7. Section 65, subdivision 1: Order for extension of service by natural gas corporation. *James O. Moore v. Pavilion Natural Gas Company*. 277

Railroad Law.

1. Section 9: Certificate of public convenience and a necessity. *Application of Niagara River & Eastern Railroad Company, Inc.* 348

2. Section 8, subdivision 10: Consent to railroad mortgages. *Petition of Erie Railroad Company*. 108

3. Section 21: Cost of planking at the outside and between the rails in case of a crossing by a new highway. *Petition of Town Board and Town Superintendent of Highways, Town of Barton.* 380

4. Sections 90 and 94: New highway crossing; distribution of expense. *Id.*

5. Section 90: Opening new street across steam railroad. *Petition of Board of Public Works of Rome.* 326

6. Section 93: Highway crossing by means of an overhead bridge. *City of Middletown v. Erie Railroad Company and Wallkill Transit Company.* 100

7. Section 181: Restriction of fares on street railroads, from charging more than 5 cents for a continuous ride from one point to another point within the limits of an incorporated city. *Matter of United Traction Company's Proposed New Passenger Fares and Charges.* 287

Rates, Gas.

Where the maximum rate for natural gas is restricted to 40 cents per M cu. ft. by the terms of a municipal franchise, a minimum charge of 50 cents for such gas service is unauthorised: by enforcing the same the company might thereby exact a maximum charge greater than the amount prescribed. *Inhabitants of the Village of LeRoy v. The Pavilion Natural Gas Company.* 186

Rates, Railroad.

1. As the result of an inquiry into the reasonableness of a switching charge, the respondent was ordered to put into effect a tariff of 15 cents per net ton, with a minimum of three dollars per car. *West Virginia Pulp and Paper Company v. Boston and Maine Railroad.* 9

2. A railroad corporation which has constructed and is operating an industrial siding serving various industrial enterprises should establish a charge for switching cars of a railroad intersecting its line in a city, and that corporation should absorb its proper proportion of such switching charge. So held where consignees were required to pay the former corporation its tariff rates for 3.08 miles to the next station, and a like amount back to the siding which joined its tracks just west of the city corporation line and extended a mile and a-half into the city. *Chamber of Commerce of Newburgh v. Erie Railroad Company and The New York Central Railroad Company.* 142

3. The question of the fairness of the rates for straight carload shipments of cement can not properly be adjudicated in a proceeding brought to compel the withdrawal of a tariff on mixed carloads of cement and other specified articles: the question should be raised by a direct attack upon the straight carload rates. *The Atlas Portland Cement Company et al. v. Boston and Maine Railroad.* 322

Rates, Telephone.

1. Except in the case of increases of rates by common carriers, the burden of proof is upon complainants to show that existing rates are unjust and unreasonable. *People ex rel. N. Y. C. & H. R. R. Co. v. P. S. C.*, 215 N. Y. 241; *People ex rel. N. Y. Tel. Co. v. P. S. C.*, 160 A. D. 448. *Board of Trade of the Village of Malone v. Mountain Home Telephone Company.* 74

2. A telephone corporation, several years before the sale of its physical property, had increased the rates beyond those fixed in the franchise, and there had been a general acquiescence in such increase; held that a demand on the successor corporation to restore the original rates is stale. *Id.*

3. In determining the reasonableness of rates, regard must be paid to a reasonable average return upon the value of the property actually used in the public service and the necessity of making reservation out of income for surplus and contingencies. In ascertaining the value of the property it is immaterial whether it was acquired by the issuance of stock or bonds, out of income, or otherwise. No reduction could be made on a return of $\frac{1}{2}$ of 1 per cent for one year, and $1\frac{1}{2}$ per cent for the following six months. In adjusting a schedule where the value to business subscribers of an extended residence service is important, it is not improper that the business rates should bear some burden although the residence rates seem low by comparison. Certain toll charges were examined and held not unreasonable. *Id.*

4. Contiguous communities varying widely in population and otherwise may properly be embraced in a single base rate area in which identical service is rendered at uniform flat rates without charge for toll between the various exchanges. So held of "Troy group," consisting of the cities of Troy, Cohoes, and Watervliet; and villages of Green Island and Waterford. *Cities of Troy and Watervliet and Village of Waterford v. New York Telephone Company.* 194

5. A measured rate schedule is the most consistent and equitable rate basis thus far devised, although the time may not be ripe for its general inauguration. *Id.*

6. Where a hotel had installed a telephone system at its own expense, by invitation and under the supervision of the telephone corporation, under a special contract made before the law subjected such corporations to regulation, a proper tariff for future service should be the regular tariff less a sum equivalent to interest on the present value of the system plus a suitable allowance for depreciation. Such a tariff rate is not shown to be unjust or unreasonable by evidence that it greatly exceeded a former rate established under competitive conditions, nor by evidence that patrons refuse to pay tolls on local calls and the hotel bears the burden of such calls rather than lose patronage. Such a private exchange provides economies in the way of interior service and should not be expected to yield revenues sufficient to carry its cost. *Woodruff Hotel Company v. New York Telephone Company.* 224

Service, Electric Railroads.

1. A corporation will not be required to extend the operation of its cars during the winter months for the purpose of developing real estate and improving the value thereof when there is not sufficient traffic to warrant the operation of cars over that portion of its line. The duty of the Commission is to require service when the same is necessary for the convenience of the public and the traffic warrants such service. *John E. Judge v. Plattsburgh Traction Company.* 61

2. It was held improper to order a trolley line which is now losing money in its regular passenger business to continue to carry freight at a loss, under such conditions as appeared in the case. The fact that a steam railroad corporation owns or controls a majority of its stock does not of itself alter the situation or establish any material change in its obligations to the public in respect to freight transportation. *Complaint of Patrons of Freight Service of The Long Island Railroad Company.* 130

Service, Express Companies.

On the facts stated, held that the refusal of an express company to extend its free collection and delivery limits so as to include the place of business of the complainant operated as an unjust discrimination. *Frank B. Saunders v. American Express Company.* 180

Service, Gas.

Section 62 of the Transportation Corporations Law makes it the absolute duty of a gas corporation, subject to the conditions of that section, to supply gas to the owner or

occupant of any building or premises within one hundred feet of its mains. If the distance be more than one hundred feet, the Commission may require service to be rendered if it is reasonable so to do. If the Commission determines that it is reasonable, it may fix the terms upon which it should be rendered. *John P. Draney et al. v. Central Hudson Gas and Electric Company.* 334

Service, Natural Gas.

Subdivision 1 of section 65 of the Public Service Commissions Law requires a natural gas corporation to furnish service by extending its facilities to the premises of an applicant, where it is shown that such extension and service are in all respects just and reasonable. Upon the refusal of the corporation to make such extension, the Commission may order it done, it having been determined by the Commission that all the requirements of subdivision 1 have been satisfied. *James O. Moore v. Pavilion Natural Gas Company.* 277

Service, Railroads.

1. The Commission will not order additional train service where the existing service seems to be adequate in quantity and the additional service is sought by a limited number of patrons as a matter of convenience rather than necessity, and would almost certainly be unprofitable in itself, the entire passenger business of the divisions concerned being conducted at a loss. *Ralph A. Harter v. Lehigh Valley Railroad Company.* 42

2. A radical change in schedules in effect a number of years, and which on the whole meet the convenience of the traveling public, will not be ordered to meet the convenience of a small part of that public. In the light of evidence as to the cost of operating steam passenger trains, the inadequate returns in territory not densely populated, and known facts concerning recent decreases in operating revenues of such trains, it was suggested that the carriers endeavor by cheaper methods to provide more convenient service. *Id.*

3. It was held improper to order a trolley line which is now losing money in its regular passenger business to continue to carry freight at a loss, under such conditions as appeared in the case. The fact that a steam railroad corporation owns or controls a majority of its stock does not of itself alter the situation or establish any material change in its obligations to the public in respect to freight transportation. *Complaint of Patrons of Freight, Service of The Long Island Railroad Company.* 130

4. Although there is a legal obligation to supply both passenger and freight service the demand for passenger service may be so slight that the Commission would not be justified in ordering it. If the demand is substantial, it should be ordered. It is not a sufficient ground to refuse to perform a part of its obligation, that there is a loss in performing that part which reduces the profits from other service. Passenger service was ordered by a mixed train if the railroad corporation so elects. *Edward S. Agor v. The New York Central Railroad Company.* 208

5. When material changes were made December 4th in the operation of Belt Line trains between Albany and Troy, discontinuing trains on notice given not earlier than December 1st, the Commission held it questionable whether it could order a restoration of service without proceeding to take testimony concerning all the facts pertaining to the operation of Belt Line trains. A further hearing was directed. *The New York Central Railroad Company.* 428

Service, Telephone.

1. Complaints found to be justified when complaints were filed, if pending the proceeding improvements are effected, do not justify specific order for further improvements. *Board of Trade of the Village of Malone v. Mountain Home Telephone Company.* 74

2. A corporation will not be permitted arbitrarily to discontinue existing service through privately owned switchboards and instruments which were installed at its invitation and

requirement, under its supervision, and not shown to have become inefficient or to depart from its standard equipment. *Woodruff Hotel Company v. New York Telephone Company*. 224.

3. It was held that service should be installed at High Hill Beach, a summer colony having some six hundred summer residents and a transient population on Sundays and holidays of from twelve hundred to fifteen hundred people. The question of how a resulting loss, if any, upon the investment should be met, left for subsequent adjustment in case it should arise. *High Hill Beach Improvement Association v. New York Telephone Company*. 318

Sidetracks.

1. Although it is the settled policy of the State, as well as the City of Buffalo where there is a local Grade Crossing Commission, to eliminate all dangerous crossings, it is not a departure therefrom to approve the construction of a switch track across a street in the railroad and industrial section of that city when authorized and its operation regulated by the city. *Joint Application of The New York, Lackawanna and Western Railway Company and The Delaware, Lackawanna and Western Railroad Company*. 149

2. The reasonable requirements of a railroad corporation, coupled with the accommodation afforded an industry by the construction and operation of a switch track or siding, constitute public convenience and necessity as defined by the Public Service Commissions Law. *Id.*

3. The establishment of a siding may be directed which does not connect with a sidetrack owned, operated, controlled by, and on the property of, the shipper. *Harry Jackson v. Erie Railroad Company*. 415

4. The statutory requirement that the business shall be "sufficient to justify" the construction of a sidetrack relates to the business of the applicant, and does not mean that the total coal business transacted in the neighborhood must show an increase in order to justify the Commission in ordering a sidetrack built. The Commission may base its judgment upon the entire volume of the business the shipper transacts, even though some of the coal comes to him from points outside the State. *Id.*

Stations.

A station building having been burned, a dispute arose as to the location of a new station. Held that the corporation has the first right to determine the location of a station, provided the requirements of section 50 of the Public Service Commissions Law have been fairly complied with, even though the Commission is satisfied, for sentimental or other reasons, that the station should go to another place. *Residents of West Falls v. Buffalo, Rochester and Pittsburgh Railway Company*. 297, 330

Statutes.

1. Chapter 667, laws of 1915, repeals section 25 of the Transportation Corporations Law: Certificates to auto bus lines. *Petitions of LaRoy D. Becraft and James E. Adams*. 51 *Petitions of Allen P. Bartholomew and John J. Neil*. 96

2. Section 37, Second Class Cities Law: Sale of franchises at auction. *Application of Troy Auto Car Company, Inc.* 396

3. Chapter 667 of the laws of 1915: Municipal consent to auto bus line; "Public convenience and necessity" defined. *Id.*

4. Sections 25 and 26, Transportation Corporations Law: Certificates to auto bus lines *Petition of Carpenter's Bus Line, Inc.* 204

5. Chapter 216, laws of 1846, incorporating the Hudson River Railroad Company, and limiting passenger fares between New York and Albany to 2 cents per mile, was repealed by implication by the General Railroad Law of 1850 (*Johnson v. Hudson River R. R. Co.*, 49 N. Y. 455). *Matter of Proposed New Passenger Fares, The New York Central Railroad Company.* 230

6. Section 62, Transportation Corporations Law: Duty to supply gas. *John P. Draney et al. v. Central Hudson Gas and Electric Company.* 334

7. Section 36, General Corporation Law: Forfeiture for non-user. *Northern Adirondack Power Company v. J. & J. Rogers Company.* 391

Telephone Corporations.

The law permits a telephone corporation to purchase the physical property of another telephone corporation without the consent of the Commission. *Board of Trade of the Village of Malone v. Mountain Home Telephone Company.* 74

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